84-688

No. 84-——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAROL JEAN VOSCH, executrix of the last will of Charles Lowry, deceased
DAVID GAIBIS and others similarly situated,
Petitioners,

v.

WERNER CONTINENTAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether certiorari should be granted in this case to decide whether individual union employees may bring a Section 301 action (29 U.S.C. § 185) against their employer to vacate a labor arbitration award which was violative of public policy without also alleging that their union breached its duty of fair representation.

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REFERENCE TO OFFICIAL REPORTS OF OPINIONS OF THE COURTS BELOW

1. District Court Opinion—*Gaibis* v. *Werner Continental, Inc.,* Civil Action No. 78-1211 (decided June 14, 1983), 565 F.Supp. 1538 (W.D. Pa. 1983).

2. Circuit Court Opinion—*Vosch* v. *Werner Continental, Inc.,* No. 83-5468 (decided May 14, 1984), 734 F.2d 149 (3d Cir., 1984).

JURISDICTION

Petitioners herein pray that a Writ of Certiorari be granted by this Court to review a determination of the United States Court of Appeals for the Third Circuit, made May 14, 1984, which reversed an Order of the United States District Court for the Western District of Pennsylvania, made June 14, 1983.

Petitioners filed a timely Petition for Rehearing In Banc with the Third Circuit which was denied on June 29, 1984.

Petitioners sought and received on October 1, 1984, an Order from this Court, through Associate Justice William J. Brennan, Jr., extending the time for the filing of this Petition until October 27, 1984.

Jurisdiction of this Court to review the determination of the United States Court of Appeals for the Third Circuit is given by 28 U.S.C. § 1254(1). This Petition is being made by the Plaintiffs in the cause below.

STATUTES INVOLVED

The statute involved in this case is Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In relevant part that section reads as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioners, truck driver employees of the respondent, are members of Local 261, of the International Brotherhood of Teamsters. Following their suspensions and ultimately their discharges, Petitioners brought this action pursuant to 29 U.S.C. § 185 to vacate the grievance committee and arbitration decisions that upheld their suspensions and discharges.

On June 14, 1983, following years of litigation, the District Court found in favor of the Plaintiffs, Petitioners herein, held that the arbitration awards in question were in violation of public policy in that they violated the federal safety regulations found in Federal Motor Carrier Safety Regulations, ordered them vacated and ordered the Petitioners reinstated with full back pay.

On May 14, 1984, the United States Court of Appeals reversed the decision of the District Court holding that the employees failed to state a cause of action. This Petition follows that ruling.

Facts

Respondent Werner Continental is an interstate carrier, certificated by the ICC. It employs over-the-road truck drivers to haul its freight, Petitioners and their class are and were truck drivers, employees of Respondent. They are also members of Teamsters Local 261 of the International Brotherhood of Teamsters.

After a driver has returned to the W. Middlesex terminal after hauling a load and after his federally required eight hour rest period, Werner Continental

requires that he be continuously available for dispatch. Werner Continental has no regulated work week and cannot tell the driver when a dispatch can be expected. Because of the unpredictability of the system, "available" means waiting by their telephone literally 24 hours a day, seven days a week to be dispatched by the company for a load. The driver-employee, of course, has no way of knowing when the call might come in. He might wait by his phone for an hour, a day, or even several days before the call comes in.

If the Respondent Company calls the driver and he is not home, or if his line is busy for more than 15 minutes, he is then considered unavailable or *absent* and becomes subject to discipline. If the driver had waited all day and into the night for a call which never comes then lies down to sleep and the phone rings with a dispatch, he must take the load and is not permitted to then book off as *fatigued.* If he takes the load, and tries to pull over during his run because he is tired, he is disciplined for that as well.

Disciplining drivers for absenteeism under the above described dispatch and logging system violates Federal Hours of Service Safety Regulations (49 CFR § 395.8(a), 395.2(a) and 392.3), which define "off duty time," "on duty time," and deal with avoiding fatigue. Further, official interpretations of these regulations, make it clear that the dispatch and logging system of Petitioners accompanied by discipline of drivers up to and including discharge for violations thereof, clearly violates these safety regulations.

Discipline takes the form of warning, suspension or even discharge. This practice of Respondent takes

on even more frightening proportions inasmuch as the Respondent requires the drivers to log this time when they *must* be available as "off-duty" time. Thus, if the Respondent calls the Employee, who for example is at church or mowing the lawn, five times in an hour (which often occurs), this is considered five absences. This is so even if the employee had been home waiting for a call for hours or even days before he stepped out.

This accomplishes a two fold purpose for the company: first, the company need not pay its drivers while they are "off-duty", despite the fact that they are subject to discipline for being "absent" during this "off-duty" time. Second, if this time were logged as on-duty, which Petitioners contend it should, then this waiting time would count against the maximum number of hours that each driver is allowed by Federal law to log as "on-duty" during a particular time period. Thus, the log of a driver who may have been awake and by his phone for twenty straight hours before he is dispatched would reflect that he has had plenty of rest and is ready to drive. In reality, he may be totally exhausted when he steps into his vehicle and thus create a serious safety hazard for himself and the motoring public.

In addition, when the Respondent gets in touch with a driver, he is required to be ready to haul the load and be physically present within two hours. Thus, his ability to ever go any distance from home for whatever reason or to get a long sleep, is severely limited.

When the driver is disciplined for not being "available" during what is allegedly his own free off-duty

time (which the applicable Federal Regulations mandate to be time that a driver must be "free to pursue activities of his own choosing," and "completely relieved of all responsibility" to the Company, the discipline is considered to be for "absenteeism from work."

The two named Petitioners in this case, Gaibis and Lowry were discharged for "chronic and habitual absenteeism" because they missed phone calls while they were supposedly "off-duty" and "free to pursue activities of their own choosing."

Petitioner Gaibis, a Union Steward and Petitioner Lowry grieved these discharges and the discharges were upheld in the teamster-company grievance procedure.

The Petitioners, and not the Local Union, brought this action pursuant to Section 301, 29 U.S.C. § 185, alleging that these awards, which upheld the Company's practice of requiring drivers to stand by their phones in readiness for work 24 hours a day and to log this time as "off-duty", when it was in reality "on-duty" time, were violative of public policy in that they violated federal safety regulations promulgated by the (Federal) Bureau of Motor Carrier Safety.

The District Court agreed, found the awards to be violative of public policy, held that there exists a "public policy exception" to the finality rule of labor arbitration awards and ordered the awards vacated.

The Petitioners did not sue the Union alleging a branch of duty of fair representation. Nor did they rely simply on a theory of mere breach of contract as a basis for vacating the grievance awards.

During oral argument of this case in the Circuit, the Court raised the issue upon which it ultimately dismissed *sua sponte*. Despite the Respondent conceding that individual employees could bring such a suit by virtue of the allegations contained therein, the Appeals Court nevertheless reversed the District Court and ordered the Complaint dismissed.

In so doing, the Appeals Court essentially held that absent a claim by the employee that his or her Union breached its duty of fair representation, an employee could not bring a Section 301 action to vacate an arbitration award, even if the award were violative of public policy and required the employee to break the law.

ARGUMENT

Certiorari Should Be Granted in This Case To Decide Whether Individual Union Employees May Bring a Section 301 Action (29 U.S.C. § 185) Against Their Employer To Vacate a Labor Arbitration Award Which Was Violative of Public Policy Without Also Alleging That Their Union Breached Its Duty of Fair Representation.

Petitioners recognize the longstanding rule that the decisions of labor arbitrators and grievance committees are final and not subject to judicial review. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). This rule, however, is not without exceptions.

As this Court wrote in *Enterprise Wheel and Car, supra,* at 597:

> ". . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own

> brand of industrial justice. He may of course look for guidance from many sources, yet *his award is legitimate only so long as it draws its essence from the collective bargaining agreement.* When the arbitrator's words manifest an infidelity to this obligation, *courts have no choice but to refuse enforcement of the award.* (emphasis added).

Since the time of *Enterprise Wheel, supra,* and the *Steelworkers Trilogy,* courts have recognized a number of exceptions to the rule of finality.

Perhaps the most important of these narrow, limited exceptions, is the one relied on in this case, the public policy exception where an award or the conduct which it upholds is inconsistent with public policy or requires a party to violate the law, it most certainly cannot be given finality by the Court; *Ludwig Honold* v. *Fletcher,* 405 F.2d 1123, at 1128 n.27 (3d Cir., 1969); *Teamsters* v. *Consolidated Freightways,* 464 F. Supp. 346 (W.D. Pa. 1979); *I.B.T.* v. *W. Pa. Motor Carriers, supra,* at 786 n.5; and *Banyard* v. *N.L.R.B.,* 505 F.2d 342 (D.C. Cir. 1974).

It is clear, therefore, that in most situations the award is final. And, it is even more of a certainty that an arbitration award cannot be set aside simply because it is alleged by the Employee or the Union that the employer's actions, such as in a discharge case, constitutes a mere breach of the labor contract. If an arbitrator, for example, chooses to believe the evidence of the Company that the Employee was sleeping on the job, the Court will never review such a decision merely on the basis of the Union's or Em-

ployee's allegation that the dicharged Employee was not sleeping on the job.

Although the concept of non-reviewability in the type of situation stated immediately above appears obvious, there is one occasion when such an arbitration can be reviewed. A simple allegation of breach of contract by an Employee under 301 will subject an arbitrator's decision to review without regard to the rule of finality if, as a part of that action, the Employee also alleges a breach by the Union of its duty to fairly represent the Employee. As this Court held in *Vaca* v. *Sipes,* 386 U.S. 171 (1967), many times thereafter, and most recently in *Delcostello* v. *I.B.T.,* —— U.S. ——, 103 S.Ct. 2281, 2290, it would be unfair to the Employee to apply the finality rule when he is essentially deprived of a fair hearing due to the Union's inadequate representation. Thus, actions alleging simple breach of contract can only survive if the employee also alleges a breach of duty by the union. This is the only time that the finality rule does not apply when the only claim is a mere breach of contract.

Actions seeking to vacate an arbitration award because the award violates public policy, or because the award was fraudulently obtained, or because it absolutely fails to draw its essence from the contract, or because the award was beyond the jurisdiction of the arbitrator, have never required an allegation of breach of duty. These type of 301 suits fit into the exceptions to the finality rule without the necessity of also alleging a breach of duty by the union. *I.B.T.* v. *Western Pa. Motor Carrier Assoc.,* 574 F.2d 783, 786 (3d Cir., 1978).

This is obvious in that most of the 301 suits referred to in the paragraph above are brought by the Union. This is only natural in that the Union, rather than the often discharged Employee, has the resources, both financial and legal to do so. And, it is also true that on most of the occasions when an Employee brings a 301 suit, the Employee also alleges that the Union breached its duty to fairly represent. This is also logical and understandable in that in most situations the Employee would rather have the Union bringing the suit, but is bringing it on his or her own precisely because the Union has, in one way or another, let him down and thus the Union is sued along with the employer.

There are no cases, however, aside from the panel's decision in the matter now before this Court, that prohibit an Employee from bringing a 301 action without alleging breach of duty by the Union, as long as the Employee sufficiently alleges a clear exception to the finality rule, such as the public policy exception. A simple allegation of breach of contract alone will not get the individual Employee *or* the Union into court, but such is not the case here.

This concept, i.e. the right of the individual Employee to bring a suit against the employer, was first recognized generally by this Court as early as 1962, in *Smith* v. *Evening News Assoc.,* 371 U.S. 195 (1962), and as recently as 1983 in *Delcostello, supra.* The 9th Circuit in addition, in *Christianson* v. *Pioneer Sand & Gravel,* 681 F.2d 577 (9th Cir., 1982), has also decided this issue squarely opposite to the Circuit's Opinion in this case.

It was this concept that was misunderstood by the panel in this case. The Appeals Court opinion erroneously held as they did, without any supporting authority, simply because prior cases seeking to vacate arbitration awards because of various exceptions to the finality rule happened to be brought by the Union, and not because any cases have held that the Union's serving a plaintiff was a requirement. *Vosch* v. *Werner Continental* (Circuit Opinion in this case), 734 F.2d 149, 154-155 (3d Cir., 1984).

The language in *UPS* v. *Mitchell,* 451 U.S. 56, 62 (1981), *Vaca* v. *Sipes, supra,* at 195-198, and *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 563, 567-569 (1976), which discusses the need for an Employee to allege breach of duty before he or she can prevail in a 301 suit, is only stated in the context of a 301 suit that simply alleges a mere breach of contract and not any of the exceptions to the finality rule. Clearly, as *Vaca, supra,* observes, a 301 suit brought by an Employee who alleges a simple breach of contract, cannot survive without an allegation of breach of duty by the Union as well. But no breach of duty allegation is required when the Employee sues under 301 alleging a specific exception to the finality rule, such as an award contrary to public policy.

This was made most clear in this Court's recent decision in *Delcostello* v. *I.B.T., supra.* There the ultimate issue decided was whether a six month statute of limitations akin to an unfair labor practice should govern 301 suits brought by an Employee where a breach of duty is also alleged. This Court ultimately held that the six month statute would govern acknowledging, as Petitioners herein assert, that

this is a different breed of lawsuit than a 301 suit resting on an exception to finality rule without involving a breach of duty theory.

In discussion by the Court leading up to its holding, it summarizes the law in this area by exactly stating the position of Petitioners herein at 103 S.Ct. 2290:

> [2, 3] It has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement. *Smith* v. *Evening News Assn.*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962). Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); cf. *Clayton* v. *Automobile Workers*, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed.2d 538 (1981) (exhaustion of intra-union remedies not always required). Subject to very limited judicial review, he will be bound by the result according to the finality provisions of the agreement. See *W. R. Grace & Co.* v. *Local 759*, —— U.S.——, at —— 103 S.Ct., ——, at——, 75 L.Ed.2d 1424 (1960). In *Vaca* and *Hines*, however, we recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration proceduce acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. (Citations omitted).

Stated simply, this Court in *Delcostello, supra,* recognized that individual employees can sue the com-

pany under § 301 to vacate an award without alleging breach of duty, even though it is difficult in that only narrow exceptions like public policy exist. However, when the employee *also* alleges breach of duty by the Union, he then can sue under § 301 by merely alleging a simple breach contract without need to allege an exception to the finality rule.

In *Hines, supra,* at 562, this view was also generally set forth:

> Section 301 contemplates suits by and against individual employees as well as between unions and employers; and contrary to earlier indications § 301 suits encompass those seeking to vindicate "uniquely personal" rights of employees such as wages, hours, overtime pay, and wrongful discharge. *Smith* v. *Evening News Assn., supra,* 371 U.S. at 198-200, 83 S.Ct., at 269-270.

Further, the seminal case in this regard, *Smith, supra,* is also directly supportive of Petitioners' position. There, this Court held as follows:

> The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301

> would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.
>
> The same considerations foreclose respondent's reading of § 301 to exclude all suits brought by employees instead of unions.

This logic is particularly applicable in situations like the instant matter where the individual seeks to assert rights personal to himself as opposed to an issue affecting the union as a whole.

Although few lower courts have had to deal with this specific issue, the 9th Circuit has. In so doing, that Court held that an Employee had standing to bring a 301 suit without alleging breach of duty against the Union. That Court held as follows:

> Absent the special consideration of preserving the finality of arbitration, that was present in *Mitchell,* we hesitate to apply Justice Stewart's suggestion that an employee must prevail against his union in order to make his claim against the employer for breach of a collective bargaining agreement. The respective breaches of duty by the union and the employer often may be wholly unrelated, and we see no reason why an employee's failure to prevail upon his claim of breach by one of the two should preclude recovery from the other. See *Vaca* v. *Sipes,* 386 U.S. 171, 195-98, 87 S.Ct. 903, 919-921, 17 L.Ed.2d 842 (1967); *Czosek* v. *O'Mara,* 397 U.S. 25, 29, 90 S.Ct. 770, 773, 25 L.Ed.2d 21 (1970). Such a rule would prove especially harsh where, as here, the employee has lost one of his claims, not on the merits, but on the basis of a statute of limitations. (*Christianson, supra,* at 580).

Although the Court in *Christianson, supra,* was dealing with a situation where the Union did not even take the matter to arbitration, the Ninth Circuit even goes further than Petitioners herein suggest is necessary. The *Christianson, supra,* Court implies that a mere breach of contract claim, without the necessity of alleging one of the narrow exceptions to the finality rule, such as public policy, would be a sufficient basis for an individual employee to get into Court.

In the instant matter, Petitioners ask this Court to grant certiorari to decide only the question of whether an individual employee can bring suit under Section 301 of the Labor Act, 29 U.S.C. § 185, to vacate an arbitration award that is violative of public policy, without having to sue the Union for breaching its duty of fair representation. This is a narrow yet vitally important question which Petitioners contend is already the law of the Court or, in the alternative should be clarified and made to be the law.

No legitimate policy reason exists to justify this arbitrary exclusion by the Appeals Court of the Employee's right to sue pursuant to Section 301.

Where the Employee sues without alleging breach of duty, he can only survive summary judgment much less prevail on the merits, if he sufficiently pleads one of the few very narrow exceptions to the finality rule.

What possible justification can there be in refusing to allow an individually aggrieved Employee to sue in order to vacate grievance decisions which, as in

the instant case, uphold the Employer's right to force his Employees to break the law, which violate important federal safety regulations designed to protect the public as well as the Employees, and which, therefore, are violative of public policy.

The very small number of such cases brought by individual Employees prior to the lower court's *first of its kind* opinion, speaks for itself as evidence that the proverbial floodgates will not be opened. What Petitioners herein seek this Court to reaffirm has always been the law, yet the floodgates nevertheless remain barely ajar.

To be sure, as observed earlier herein, many cases, ranging from *Vaca* v. *Sipes,* 386 U.S. 171 (1967), to *Findley* v. *Jones Motor Freight,* 639 F.2d 953 (3d Cir., 1981), discuss the need for individual Employees challenging grievance awards to prove a breach of the duty on their Union's part. In every one of those cases, however, the Courts recognized that Plaintiff's underlying claim against the employer was a simple breach of contract claim based upon the collective bargaining agreement. None of the basic duty of fair representation cases involved public policy attacks on grievance awards.

At best, then, any argument that Plaintiffs in public policy cases must prove a breach of the Union's duty of fair representation, is an argument by analogy only. After all, an Employee who has lost a grievance and who subsequently attacks the grievance award as violating public policy, when viewing the matter in a simplistic way, is not a very different position from an Employee who has lost a grievance and attacks the award as being simply a violation of

the collective bargaining agreement. The ultimate relief sought is the same, and the two claims can even be asserted in the same action. On the surface, it is tempting to conclude as the Circuit did in this case, that if proof of a Union's breach of the duty of fair representation is required in one case, it should also be required in the other.

Unfortunately, such a conclusion is seriously flawed. It focuses on the superficial similarities in the positions of the Plaintiffs, and ignores the much more significant differences in the purposes, and the very natures, of the two types of challenges to grievance awards. When a Plaintiff is simply claiming that his or her employer breached the collective bargaining agreement, a number of major policies, basic to the scheme of modern labor law, counsel against allowing the Employee unfettered access to the courts in order to sue the employer. These policies and principles, as discussed in *The Steelworkers Trilogy (United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp., supra), Vaca* v. *Sipes, supra,* and *Hines* v. *Anchor Motor Freight, supra,* include the notion that contract grievance machinery is at the heart of industrial self-government; that the parties to a collective bargaining agreement have bargained for an arbitrator's (or grievance committee's) interpretation of their agreement, not a court's; that Unions, as the exclusive representatives of their bargaining units, have an interest in controlling the presentation of grievances; and that the parties' motivation for establishing grievance procedures would be undermined if grievance deci-

sions were subject to frequent and broad judicial review. All of the policies arguably militate against Employee access to the courts over *ordinary contract disputes*, unless the Employee can first prove that the grievance process "has fundamentally malfunctioned by reason of the bad-faith performance of the Union"—*i.e.*, a breach of the duty of fair representation. *Hines* v. *Anchor Motor Freight, supra,* 424 U.S. at 529.

None of these policies and principles, however, require the proof of such a breach of duty when the Employee is challenging the grievance award as violating public policy. Nor has this Court ever so held. For example, no court has ever suggested that industrial self-government entails the right to enter into contracts which violate the law, or the right to enforce otherwise legal contracts in an illegal manner. On the contrary, public policy challenges to grievance awards are designed precisely to prevent such conduct. *See, e.g., Permaline Corp.* v. *Painters Local 230,* 639 F.2d 890, 895 (2d Cir., 1981).

Similarly, public policy challenges to grievance awards do not undermine the parties' preferences for arbitrators or grievance committees as the final interpreters of their collective bargaining agreements. When a court vacates a grievance award as contrary to public policy, it is not reinterpreting the contract; it is simply holding that the contract, as interpreted by the arbitrator or grievance committee, or the actions of the employer, violate public policy.

The strength of Petitioners' argument is greatly increased by virtue of the fact that it is the *public policy* exceptions to the finality rule that forms the

basis of Petitioners' Complaint in this case and was crux of the District Court's opinion holding for Petitioners. Here, where the employer is requiring its Employees to violate federal safety regulations and to drive in a dangerously fatigued manner, much more than a simple question of breach of contract is involved, particularly when the grievance committee upholds this unlawful conduct. In such situations, not only are the Union, the Company, and the individual aggrieved Employee affected, but the public as well. In this particular case, the safety of all motorists is at stake. As the Second Circuit held in *Permaline Corp.* v. *Painters Local 230,* 639 F.2d 890, 895 (2d Cir., 1981), "If . . . the award in question is contrary to law or public policy, it is open to, indeed it is incumbent upon, the Court to step in."

And as the Ninth Circuit held in *Work Airways, Inc.* v. *Teamsters Airline Division,* 578 F.2d 800, 803-4, n.8, in another case where an award inconsistent with public policy was vacated, "we are concerned . . . with the safety of the air-traveling public, who are not parties to the [collective bargaining agreement] and are unable to participate in the selection of the arbitrator".

This Court in *Barrentine* v. *Arkansas-Best,* 450 U.S. 728, at 742 (1981) recognized that there are times when a Union, without being guilty of breaching its duty, might sacrifice a meritorious grievance. There, this Court held that: "Even if the Employee's claim were meritorious, his Union might, without breaching its duty of fair representation reasonably and in good faith decide not to support the claim vigorously in arbitration . . . [A] Union balancing individual and collective interests might validly per-

mit some Employees' [interests] . . . to be sacrificed if [it] . . . would result in increased benefits in the bargaining unit as a whole." *Barrentine* v. *Arkansas-Best Freight System, supra.* See also *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 58 n.19 (1974). Where this type of balancing on the part of the Union's results in grievance awards violative of public policy, the Unions and employers obviously have no incentive to challenge the awards themselves, and the public interest will remain undefended unless individual Employees are permitted to raise these challenges themselves independent of any fair representation claims they may have.[1]

In fact when the actions of employers toward their employees are violative of public policy, some courts

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[1] The Appeals Court in its opinion referred to *Rothlein* v. *Armour & Co.,* 391 F.2d 574, 579 (3d Cir., 1968) which, following the teachings of *Smith* v. *Evening News, supra,* held that an Employee could sue on his own if he could show the arbitration to be a "sham or is substantially inadequate or unavailable." The panel in this case then held that such a situation is not here alleged. First, it should be noted that the *Rothlein, supra,* case was decided before the Third Circuit had even recognized the public policy exception.

Further, there is only a very subtle distinction between a grievance procedure that is "substantially inadequate" and a grievance procedure that produces an award violative of public policy. This is particularly true in this case where the teamster grievance procedure was involved, a procedure often questioned for its fairness by Courts and legal scholars. See *General Drivers* v. *Young & Hay Transportation,* 522 F.2d 562, 567 n.5, (8th Cir., 1975), and citations contained therein; and *Azoff, Joint Committees as an alternative form of arbitration under the NLRA,* 47 Tulan L. Rev. 325 (1973). Can such a narrow and arbitrary distinction be sufficient to cut off an individual's capacity to sue?

have been so concerned that courts have recognized *tort* actions for wrongful discharge in violation of public policy in a non-employee at will situation and where the discharge was upheld in arbitration. *Garibaldi* v. *Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir., 1984). In *Garibaldi, supra,* although the *individual employee's* Section 301 count was dismissed because of a statute of limitations problem, the Ninth Circuit allowed the Plaintiff to proceed on a *tort* theory by virtue of the public policy allegations.

Petitioners respectfully request that this Court grant certiorari to clarify and decide this most important issue. Petitioners suggest that this can be done either because the Third Circuit has decided this case in conflict with the applicable decision of this Court or because a conflict exists among the Circuits.

Clearly, however, if this Court does not agree that its decisions cited herein from *Smith* v. *Evening News, supra,* through *Delcostello* v. *I.B.T., supra,* conflict with the Circuit's Opinion, the issue, then, is one that should be settled by this Court in that without question no decision of this Court agrees with the Circuit's Opinion herein.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-5468

CAROL JEAN VOSCH, executrix of the last will of
Charles Lowry, deceased
DAVID GAIBIS and others similary situated
Appellees

v.

WERNER CONTINENTAL, INC.,
Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania

C.A. No. 78-1211

Argued March 2, 1984

Before: ADAMS AND SLOVITER, *Circuit Judges,*
and KELLY, *District Judge**
(Filed May 14, 1984)

RONALD A. BERLIN
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Attorneys for Appellees

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* Honorable James McGirr Kelly, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

FRANCIS M. MILONE (Argued)
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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

David Gaibis and Charles Lowry were employed as over-the-road drivers by Werner Continental, Inc. (Werner) at its break-bulk terminal in West Middlesex, Pennsylvania. Werner, a freight carrier certified by the Interstate Commerce Commission (ICC), was acquired in January 1979 by Hall's Motor Transit Company (Hall's).

After having been dismissed from their jobs for "chronic and habitual absenteeism," Gaibis and Lowry brought suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), and the Fair Labor Standards Act, 29 U.S.C. § 216 (1976). The plaintiffs asked that three grievance awards affirming their dismissal be set aside and that Hall's be enjoined from requiring its drivers to comply with the company's dispatch system. The district court granted this relief, and Hall's filed a timely notice of appeal.[1] Because the complaint did not state a cause

[1] The district court denied plaintiffs' claim under the Fair Labor Standards Act. It held that plaintiffs had not properly stated a claim under the minimum wage regulations and that Hall's was exempt from the maximum hours regulations by virtue of the authority vested in the Secretary of Transportation to prescribe rules governing interstate transportation under 49 U.S.C. § 304 (1976). *Gaibis v. Werner Continental,* 565 F. Supp. 1538, 1552 (W.D. Pa.

of action upon which relief may be granted, we must now vacate the judgment of the district court.

I

Freight loads are dispatched from Hall's West Middlesex complex as they become available. Hall's drivers receive their assignments by way of a telephone dispatch system that must meet the Federal Motor Carrier Safety Regulations (FMCSR's) governing driving hours and rest periods of interstate drivers. These regulations are promulgated by the Federal Highway Administration (FHA) of the Department of Transportation and are administered by the FHA's Bureau of Motor Carrier Safety (BMCS).[2]

Under the FMCSR's, 49 C.F.R. § 395.1 *et seq.* (1982), drivers must maintain an hour-by-hour log and must attribute their time to one of four categories:

1) Off-duty time (the driver is not on duty and is not required to be ready for work);

2) Driving time (the driver is at the controls of a motor vehicle in operation);

1983). The district court did not address the assertion in the complaint that the dispatch system and the arbitration awards "smack of involuntary servitude" in violation of the Thirteenth Amendment to the Constitution of the United States. On appeal, Gaibis and Lowry have not pressed the Fair Labor Standards claims or the constitutional issue.

[2] The ICC has the duty under 49 U.S.C. § 304 (1976) to issue safety regulations governing the interstate transportation of goods by motor carriers. That duty was transferred to the Department of Transportation, which delegated the authority to issue safety regulations to the FHA. *See* 49 U.S.C. § 1655 (1976); 49 C.F.R. § 301.60 (1982).

3) On-duty/not-driving time (all time other than driving time from the time a driver begins work or is required to be ready for work until he is relieved from work and responsibility for performing work); and

4) Sleeping berth (a category not relevant to this litigation).

The federal safety regulations require that drivers be given eight hours of off-duty time after ten hours of driving time or fifteen hours of on-duty time. Under its dispatch system, Hall's may inform a driver by telephone that a load is available any time after the completion of the statutory rest period. Because the demand for freight services is unpredictable, a telephone dispatch may come at any time. Hall's directs its drivers to log time awaiting telephone dispatch as "off-duty." They are not paid for this time and are subject to discipline if they log the waiting period as "on-duty/not-driving."

Dispatchers at the Middlesex terminal maintain "log audit cards," on which a notation is made whenever a dispatcher fails to reach a driver who has completed the required rest period. Missed calls can lead to progressively more severe forms of discipline, ranging from a letter of reprimand to dismissal in cases of "chronic and habitual absenteeism."

II

In November 1977, Gaibis, in his capacity as union steward, filed a grievance, pursuant to the industry-wide collective bargaining compact, the National Master Freight Agreement (NMFA). He alleged that he and is colleagues had been required under peril of discipline to be constantly available for dispatch upon completion of the statutorily mandated rest period. He also asserted that Werner required its drivers to log the time awaiting dispatch as

off-duty, even though under federal regulations this time should be logged as compensible on-duty/not-driving time.

Gaibis' grievance was heard by the Western Pennsylvania Teamsters and Employees Joint Area Committee (WPJAC), a panel established under the NMFA. After that Committee became deadlocked Gaibis appealed to the Eastern Conference Joint Area Committee (ECJAC), the second stage of the NMFA grievance proceedings. The ECJAC dismissed Gaibis' complaint, asserting that the grievance was improperly before the committee.

In January 1978, Werner suspended Lowry for three days without pay; Lowry had been, in the company's view, unavailable for dispatch because he was not at home and ready to receive a dispatch on several occasions while off-duty. The WPJAC reached a deadlock on the grievance Lowry filed to protest this suspension. The union local joined Lowry in this protest and in the subsequent appeal to the ECJAC, which held that Lowry had been suspended for just cause.

Gaibis and Lowry filed a complaint in the district court in October 1978. Hall's discharged Lowry in January 1979 for "chronic and habitual absenteeism."[3] The union filed a grievance with the WPJAC, which reinstated Lowry without back pay and ordered the union and Hall's to modify the procedure by which drivers are notified of work opportunities. In March 1979, Lowry was again discharged for chronic and habitual absenteeism. Once again Lowry and the union resorted to the grievance procedure. An arbitrator ordered that Lowry be reinstated, but without back pay. In December 1979, Lowry was discharged for a

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[3] Dismissal for chronic and habitual absenteeism is sanctioned by the NMFA, which also establishes a grievance procedure by which a driver who believes that he has been unfairly disciplined can bring his claim to arbitration.

third time for chronic and habitual absenteeism. This time an arbitrator upheld the discharge.

In May 1980, Gaibis was discharged for chronic and habitual absenteeism. The union filed a grievance on Gaibis' behalf, claiming that his discharge violated the collective bargaining agreement and federal regulations. The WPJAC upheld the discharge without issuing an opinion.

Before the district court, Gaibis and Lowry asserted that Hall's dispatch procedure violates public policy, the United States Constitution, and several federal laws and safety regulations. They complained that the decisions of the grievance committees and the arbitrators upholding their discharges also violated public policy and were in addition arbitrary, capricious, and contrary to the NMFA.

III

In response to defendants' motion that the dispute be referred to the Bureau of Motor Carrier Safety (BMCS), the district court ruled that the Bureau had "primary jurisdiction" over certain questions of transportation practice and policy raised by the complaint filed by Gaibis and Lowry.[4] The court referred the matter to the BMCS to determine, among other things, whether Hall's logging and dispatch system violated the Federal Motor Carrier Safety Regulations.

After conducting a hearing, an Administrative Law Judge determined that Hall's dispatch and logging system

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[4] Primary jurisdiction is a judicially crafted doctrine which allows for preliminary review by specialized administrative agencies of claims raised before federal courts. *See* Cheyney State College Faculty v. Hufstedler, 703 F.2d 723, 736 (3d Cir. 1983).

did not infringe the BMCS hours-of-service regulations. *See* 49 C.F.R. § 395.2(a) (1982). He did find, however, that the system transgressed federal safety regulations, specifically FMCSR 392.3, by not allowing drivers to "book off" at the time of dispatch, that is, to decline an assignment because of fatigue.[5]

The FHA's Associate Administrator for Safety formally reviewed the ALJ's Recommended Decision. *See* 49 C.F.R. § 386.38(g)(1982). He agreed with the ALJ that Hall's dispatch system, and specifically the requirement that drivers log time awaiting dispatch as off-duty, did not violate the maximum hours provisions of the FMCS regulations. Unlike the ALJ, however, the Associate Administrator found that the dispatch system was sufficiently flexible for drivers to obtain adequate rest during their off-duty time. He held that the dispatch procedure and the disciplinary system complied with federal safety regulations and that Hall's did not knowingly dispatch fatigued drivers.[6]

The dispute then returned to the district court, which concluded that it was not bound by decisions rendered

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[5] FMCSR 392.3 requires that:

> [n]o driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.

49 C.F.R. § 392.3 (1982).

[6] BMCS records indicate that Hall's accident rate is well below the national average for carriers of a similar size. In 1979, Hall's drivers had 0.425 accidents per million miles travelled. The average for common carriers with fleets comparable to Hall's was 1.406 accidents per million miles. App. 409.

through an administrative process since the litigation turned entirely on a legal question, namely the construction of BMCS regulations. *Gaibis, supra,* 565 F. Supp. at 1548. The district judge held that requiring a driver to log time spent awaiting dispatch as off-duty abridged the plain meaning of the regulations governing work hours. He also found that Hall's dispatch system violated federal safety regulations by forcing fatigued drivers onto the road. The district court vacated the arbitration awards, reinstated the plaintiffs as employees of Hall's, and ordered that they be compensated for lost wages. The district court also enjoined further use of the current dispatch system and directed Hall's to establish a new procedure that conformed to certain conditions specified in the court's judgment.

IV

Given the procedural complexity of the matter before us, we will first turn our attention to the complaint filed in the district court and to the claims for relief asserted therein.

A

Gaibis and Lowry's complaint as amended appears to seek relief directly under the FMCS regulations and § 304 of the Interstate Commerce Act, 49 U.S.C. § 304 (1976).[7] Section 304 of the Interstate Commerce Act establishes the authority of the ICC (and now the BMCS), *see* note 3 *supra,* to regulate the maximum hours of employee service and the operational safety of motor carriers. The FMCS

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[7] In 1978, Congress began to revise and re-codify the Interstate Commerce Act. Section 304 has been repealed, and its several provisions now appear in various portions of Title 49. The revision does not affect the substance of old § 304 in any way relevant to this litigation.

regulations have been promulgated pursuant to that statutory grant of authority. Section 304 does not on its face, however, authorize an action brought in federal court by an individual to challenge a practice that is at odds with that section or the FMCS regulations.

Private enforcement of the Interstate Commerce Act is governed by 49 U.S.C. § 11708a (Supp. IV 1980), which allows an individual injured as a result of a "clear violation" of certain sections of Title 49 to bring a civil action to enforce those portions of the Code that have been violated. The statutory provisions whose enforcement may be the subject of a private suit, however, deal generally with the issuance of operating certificates and permits, rather than the promulgation of safety regulations. *See Baggett Transp. Co. v. Hughes Transp., Inc.*, 393 F.2d 710 (8th Cir.), *cert. denied*, 393 U.S. 936 (1968). Congress, then, has not included § 304 among those sections whose abridgement may properly lead to a private suit under § 11708.[8] *Accord Hamper v. Transcon Lines Corp.*, 425 F.2d 1178, 1179 (10th Cir. 1970).

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[8] *See* H.R. Rep. No. 253, 98th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News, 2923, 2931 (quoting S. Rep. No. 1588, 87th Cong., June 15, 1962) ("No district court is to entertain any action except where the act complained of is openly and obviously for-hire motor carriage without authority under the sections enumerated above. . . .").

Gaibis and Lowry have not specifically asked this Court to find an implied right of action under § 304. We note, however, that the key to determining the existence of an implied remedy is "the intent of the Legislature." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers, 453 U.S. 1, 13 (1981). The legislative history just cited makes clear that the Congress' intent was to specify a certain few sections of the Interstate Commerce Act, whose violation could be redressed by an individual bringing suit in district court.

B

The parties to this appeal argue that Gaibis and Lowry have properly stated a cause of action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), which provides for suits by and against labor organizations for violations of collective-bargaining agreements.[9] We cannot agree.

Like so many collective-bargaining contracts, the NMFA contains a set of procedures for settling disputes through a grievance process culminating in arbitration. Congress itself has declared that the best method for resolving grievances between employers and employees represented by a union is the procedure to which the parties themselves have agreed. *United Steelworkers of America v. Am. Mfg. Co.*, 363 U.S. 564, 566 (1980). The Supreme Court has declared that this congressional policy may be effectuated only if courts defer to the tribunals contractually designated to settle disputes. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562-63 (1976).

With the full support of their union, Gaibis and Lowry brought their claims to arbitration. In this appeal they ask us to affirm the judgment of the district court that the arbitral decisions should be overturned. However, some of the same considerations that undergird the policy of requiring aggrieved employers and employees to avail themselves of contractually specified arrangements also limit

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[9] Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185 (1976).

appeals from arbitral decisions by disappointed grievants. Employees may appeal an adverse decision under § 301 if they can show that their union breached its duty of fair representation, that is, that the union's conduct was arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 186, 190 (1967); *Rothlein v. Armour & Co.*, 391 F.2d 574, 578-79 (3d Cir. 1968). Employees may also have their claim heard in a federal court under § 301 if the grievance procedure was a "sham, substantially inadequate or substantially unavailable." *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981) (quoting *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971)).

Gaibis and Lowry do not challenge the fairness or adequacy of their union's representation in the arbitration procedure, nor do they impugn the integrity of the arbitration process. Their union did not join the suit in district court and was not named as a party to the proceeding. We are constrained to conclude that the plaintiffs did not state a cause of action under § 301.[10]

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[10] Appellants urge upon us a number of cases overturning arbitral awards that were inconsistent with public policy. While we agree that such inconsistency is a legitimate ground for upsetting an arbitral decision, we note that in each of the cases cited the trial court properly exercised jurisdiction in that one of the parties was a labor organization or the plaintiff alleged a violation of the duty of fair representation, or the collective bargaining agreement did not create a grievance mechanism. *See, e.g.*, Smith v. Evening News Assoc., 371 U.S. 195 (1962) (grievance mechanism); Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980) (fair representation); General Teamsters v. Consol. Freightways, 464 F. Supp. 346 (W.D. Pa. 1979) (union as party).

IV

Although much has occurred since Gaibis and Lowry filed their original complaint, we cannot ignore the fact that the plaintiffs have not stated a cause of action upon which relief may be granted.[11]

Accordingly, the judgment of the district court will be vacated and the matter will be remanded to the district court so that it may be dismissed for failure to state a cause of action.

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[11] This is not to say that Gaibis and Lowry had no forum in which their objections to Hall's dispatch and logging procedure could have been heard. Under 49 C.F.R. § 386.12 (1983), it would appear that they could have filed a complaint with the Associate Administrator of the FHA, who is required to issue a notice of investigation, unless he determines that the complaint is meritless. Since the issue is not properly before us on this appeal, there is no occasion to speculate about the authority of a federal district court to review an FHA decision that a complaint is without merit.

After argument had been heard on this appeal, the Court granted a motion substituting Carol Jean Vosch, executrix of the last will of Charles Lowry, as appellee.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-1211

(Opinion filed June 14, 1983)

DAVID GAIBIS, CHARLES LOWRY,
and all others similarly situated,
Plaintiffs,

vs.

WERNER CONTINENTAL, INC.
Defendants.

OPINION AND ORDER

Plaintiffs David Gaibis and Charles Lowry and all others similarly situated are or were employed as over-the-road drivers by Werner Continental, Inc. at its West Middlesex, Pennsylvania terminal. Defendant Werner Continental, Inc., is an ICC certified freight carrier engaged in interstate commerce. Werner was acquired on January 1, 1979, by Hall's Motor Transit Company, another certified interstate carrier. Plaintiffs commenced this action pursuant to the provisions of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, et seq., and the Fair Labor Standards Act, 29 U.S.C. § 216, seeking to: 1) set aside and vacate three grievance awards, 2) enjoin the defendant from requiring its drivers to comply with the current dispatch and logging procedure under the threat of discipline, and 3) have plaintiffs compensated for all lost wages and damages suffered due to defendant's illegal dispatch procedures.

On April 27, 1981, this Court entered an order requesting the assistance and input of the Bureau of Motor Carrier Safety, Dept. of Transportation (BMCS) in resolving the issues raised in this litigation. The Court determined that the BMCS had primary jurisdiction with respect to the issues of transportation practice and policy involved in the pending civil action and certified the following question for investigation and resolution in accordance with its rules of practice and procedure:

> Whether the dispatch and logging procedure followed by Hall's Motor Transit Company for its over-the-road drivers at its West Middlesex, Pennsylvania terminal violates the Federal Motor Carrier Safety Regulations, 49 C.F.R., § 390.1, et seq.

The matter is now before this Court after having been presented to an administrative law judge, who after considering the arguments of counsel and the evidence presented, entered findings of fact and conclusions of law. A reviewing official, namely, the Associate Administrator for Safety of the Federal Highway Administration in the Department of Transportation, then rendered a final decision. The court previously entered an order directing that the pending motion of Defendant Werner Continental, Inc. to Dismiss Plaintiffs' Second Amended Complaint, be treated as a Motion for Summary Judgment pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure. After argument by counsel before this Court, and the Court's review of the briefs submitted, the transcripts of the administrative proceedings, the Recommended Decision of the Administrative Law Judge and the Final Decision of the Associate Administrator, the Court will adopt the administrative law judge's findings of facts with minor changes and will make its own conclusions of law.

Findings of Fact

Plaintiff David Gaibis and Charles Lowry are individuals employed as over-the-road drivers by Defendant Werner Continental, Inc., at its West Middlesex, Pennsylvania terminal. The Plaintiffs at all relevant times have been members of Teamsters Local Union 261 (hereinafter the Union), a labor organization which has been the exclusive bargaining agent of the Plaintiffs in their employment relationship with Defendant Company in its operation at West Middlesex, Pennsylvania. The collective bargaining relationship between the Defendant and the Union was governed during the period from April 1, 1976 to March 31, 1979 by the National Master Freight Agreement and Teamsters Joint Council No. 40 over-the-road supplement agreement (hereinafter "NMFA").

Defendant Werner Continental, Inc., a trucking company certified by the Interstate Commerce Commission as an interstate common carrier of general commodity cargo, was acquired on January 1, 1979, by Hall's Motor Transit Company, another certified interstate carrier. During the entire period from 1975 to date, Werner continental, Inc., and its successor, Hall's Motor Transit Company, operated a truck terminal in West Middlesex, Pennsylvania. The combined trucking companies will be referred to hereafter as "Hall's." Any reference to "Hall's" may be taken to include the operations of Werner Continental, Inc. prior to January 1, 1979, unless otherwise specified.

Freight loads are dispatched from West Middlesex, day and night, on a sporadic basis reflecting the competition which exists among truckers to provide a fast and reliable service despite an unpredictable demand. Since Hall's operation requires that a driver be available to take to the road as soon as a load to a specific location materializes, over-the-road truck driving from the Middlesex terminal is not a 9 to 5 job with a fixed starting and quitting time.

The dispatch of the over-the-road drivers by Hall's from West Middlesex is governed not only by the nature of the trucking business, but also by the requirements of federal safety regulations which regulate the driving hours and the rest periods of interstate road drivers. These federal safety regulations, known as the Federal Motor Carrier Safety Regulations (hereinafter sometimes referred to as "FMCSR" with citation to §§ 395 to 395.13 of 49 CFR), were promulgated by the Federal Highway Administration (hereinafter "FHA") of the Department of Transportation, and are administered by FHA's Bureau of Motor Carrier Safety (hereinafter "BMCS").

Under the regulations pertaining to the hours of service of interstate road drivers, FMCSR §§ 395.1 to 395.13, the drivers are required to maintain an hour-by-hour log for every day of the year, whether they are working or not. In this log, the driver's time must be attributed to one of the following functions that would be relevant in this case:

"Off-duty time"—when the driver is not on duty, not required to be in readiness for work, and not under any responsibility for performing work.

"Driving time"—the time when a driver is at the driving controls of a motor vehicle in operation.

"On-duty not driving"—all time other than driving time from the time a driver begins to work or is required to be in readiness for work until he is relieved from work and responsibility for performing work.

The significance of the daily log derives from the requirement in FMCSR § 395.3(a)(1) and (2) that a driver must be given eight consecutive hours of off-duty time. Moreover, according to FMCSR § 395.3(b), a driver is not permitted to be on duty more than a total of 60 hours in any seven consecutive day period, or more than 70 hours in any eight consecutive day period. Because of this regula-

tion, it is of crucial importance how drivers log their off duty time. If off duty time is improperly logged as either "on duty" or "on duty not driving" then the trucking company and the drivers almost certainly would be in violation of the regulations since drivers who have been on duty too long would have been illegally dispatched. Finally, FMCSR § 395.8(a) provides that a driver who incorrectly logs his time in subject to criminal prosecution, as is a carrier who instructs a driver to log his time improperly.

There is no dispute that Hall's allows West Middlesex drivers a 10 hour rest period (or two hours more than the mandatory rest period) following 10 hours of driving time or 15 hours of on-duty time.

There is also no dispute that after the mandated 10 hour rest period is over and the driver still has at least 22 hours of "on duty" time available, a driver assigned to the West Middlesex terminal is considered to be "in service" and must be available in some form to receive a telephone dispatch call 24 hours a day. Hall's however, has not told its drivers that they must be available personally to receive a telephone dispatch call.

After receipt of a telephone dispatch call, the industry-wide collective bargaining agreement and the company's work rules provide that a driver must report to the West Middlesex terminal within two hours.

Drivers at the West Middlesex terminal are directed by Hall's to log the time while they are awaiting a telephone dispatch call as "off-duty". They are not paid for this time, and drivers who have attempted to log the waiting period as "on-duty not driving" have been warned about possible discipline, or actually have been disciplined by the company.

As long as a driver has enough driving hours available, the telephone dispatch call from the West Middlesex terminal may come at any time during the waiting period, and is unpredictable because of the nature of the demand for freight services. The driver may receive a call immediately after his 10 hour rest period ends, several days after his rest period ends, or at any time in between.

Further contributing to the unpredictability of the telephone dispatch call is the "hog" seniority system imposed by the industry-wide collective bargaining agreement. Under this system the driver with the most seniority, and possessing the necessary "off duty" hours, receives the next dispatch call irrespective of the time of his last call. It is possible, therefore, for a high seniority driver to get two or more dispatches before a driver at the bottom of the seniority list receives one.

The priority rights of "foreign" drivers is another factor contributing to the unpredictability of the telephone dispatch system. Under the concept of "foreign power courtesy," a driver from another Hall's terminal who has delivered a load to West Middlesex, is dispatched before any drivers domiciled at West Middlesex.

Because of the unpredictability of the telephone dispatch system, Hall's requires a high level of driver availability during the waiting period. "Log audit cards" are maintained by dispatchers at West Middlesex to record all incidents of driver non-availability. The audit card of a driver who is supposed to be available after the mandatory rest period is marked "busy" or "no answer" if the dispatcher fails to get through, and "absent" or "not home" or "not home will call" if someone other than the driver answers the phone, but that person does not affirmatively accept a dispatch call on behalf of the driver.

The discipline imposed for any of the forms of missed telephone dispatch calls varies with the frequency and

severity of the incidents. Missed dispatch calls are treated cumulatively, and a history of busy signals, no answers, driver non-availability when a call is completed, failure by a third party to accept a dispatch call, or failure to report to the terminal within two hours of receiving a dispatch, leads to progressively more severe forms of discipline. The forms of discipline begin with a letter of reprimand, then a suspension, then a threat of dismissal, and culminating, finally, in actual dismissal in the case of "chronic and habitual absenteeism."

"Chronic and habitual absenteeism" as grounds for dismissal is sanctioned by the industry-wide collective bargaining agreement and represents an accumulation of incidents of busy phone lines, no answers, driver non-availability if there is an answer, or failure by an answering third party to accept a dispatch on behalf of driver. If a driver believes he has been unfairly disciplined or that the charge of "chronic and habitual absenteeism" is groundless, he may invoke the grievance procedure of the industry-wide collective bargaining agreement.

Even apart from company-imposed discipline for missed telephone calls, there are strong economic incentives for drivers not to miss dispatches. Compensation and vacation time are tied to the number of "runs" a driver makes, with the result that a missed dispatch can be costly.

The unpredictability of the dispatch call and the two-hour reporting deadline, combined with the economic incentives which drivers have for not missing telephone dispatches, as well as the threat of discipline (and incidents of actual discipline) which follow missed telephone dispatch calls, tend to keep West Middlesex drivers close to their home telephones during the period when they are supposed to be available. Most drivers inform the dispatchers that they are to be reached at their home phones, and in fact most dispatch calls are received personally by the drivers at their home telephones.

One possible alternative to constant driver availability alongside the home telephone is for the driver to attempt to determine in advance when a dispatch call will come. The record shows that such driver-initiated dispatch inquiries are ineffective in freeing drivers from their home telephones because dispatchers are unable to predict when a load will be available for a particular driver.

Another alternative to personal availability alongside the home telephone—the use of secondary telephone contact points—does not permit drivers to pursue freely ordinary leisure time activity during the period when they are supposed to be available. To illustrate, a driver may want to use his off-duty time for a trip to a camping site where there are no telephones, or to see a movie or to eat at a fast-food restaurant where he cannot easily be paged. Or the driver may want to visit a regional shopping center where the use of multiple contact points is not feasible. Thus as a practical matter, the most that recourse to a secondary contact point means is that a driver may select one other phone to which he is tied, but the secondary contact point, like the primary contact point at home, must be within two hours distance of the West Middlesex terminal.

Hall's has not interferred with or discouraged the use of driver initiated dispatch inquiries or secondary contact points.

Apart from driver initiated dispatch inquires and the use of secondary contact points, the only other viable alternative to personal telephone availability identified on the record is the use of third party dispatches—that is, the acceptance of a dispatch by someone other than the driver. The availability and/or lack of availability of a third party dispatch procedure at West Middlesex was the main point of contention during the administrative hearings.

The record shows that Hall's does nothing positive to encourage the use of third party dispatches at the West Middlesex terminal. The only statement of company policy which relates to third party dispatches appears in a company bulletin dated August 5, 1975:

> If, for any reason, a driver is not going to be at the place normally called by the company when work is available, and no one else is available at that place to accept a work call for that driver, the driver is required to so notify the company so that, if a load does materialize, the driver can be reached and offered work.

Hall's interprets the August 5, 1975 policy statement as meaning that unless a third party specifically asks for a dispatch, and affirmatively represents that he or she is authorized to accept the dispatch, a third party dispatch will not be given, and the call will simply be recorded on the log audit card as showing that the driver was not available. Other trucking firms do not require the invocation of specific formulas before third party dispatches are given; the drivers merely inform these other companies once of the names of adult persons authorized to receive dispatches.

Neither the terms of the August 5, 1975 policy statement nor the interpretation of the policy statement are well known to the West Middlesex drivers or the members of the driver's family who would be the most likely recipients of those calls. Hall's third party dispatch procedure does not appear in the company's work rules nor do they appear in written dispatch instructions given to dispatchers although it is the practice of other carriers to have a written explanation of third party dispatch procedures.

The three dispatchers that testified concerning Hall's dispatch procedures were William Bullano, Edward Boyle, and Mary Kathryn Ebersole. Although each testified that

they had given dispatches to a third party, there was no one consistent method employed in making the third party dispatches. Dispatcher William Bullano testified that he gave dispatch information to third parties only if the third party indicated that immediate contact with the driver could be made for the purpose of informing the drivers to call Bullano. Upon promptly receiving a return call, Bullano would then give the dispatch to the driver.

Dispatcher Mary Kathryn Ebersole did not require that a third party specifically ask for the dispatch, but would not give the dispatch to a third party, even if it were asked for, unless that person could tell her where the driver was and when he would return, thereby assuring her that the driver would report to the terminal within the two-hour deadline. To Ebersole, who worked the night shift, a typical third party dispatch was an instance when the driver was asleep, the wife answered the phone, and Ebersole told her to wake her husband and send him to the terminal for a load. Dispatcher Edward Boyle would only give third party dispatches if the person answering the tellephone on behalf of the driver affirmatively requested that the dispatch be given. According to Boyle, third party dispatches were given infrequently.

The testimony of Louis Caccia, an employee of Hall's with twenty-one years of service, (11 of which have been spent at West Middlesex, and presently the shop steward at West Middlesex) shows that Hall's did not have a viable third party dispatch system. Caccia was called as a witness by Hall during the administrative hearings. Based upon the administrative law judge's observation of Caccia's demeanor, this Court adopts his findings that Caccia's testimony is entitled to a high degree of credibility. Caccia testified that he never received a third party dispatch; that the language of Hall's August 5, 1979 bulletin (i.e., the reference to someone else being "available . . . to accept a work call for (the) driver") does not indicate anything

to him about a third party dispatch system; and that in his view Hall's does not have a third party dispatch system. As shop steward, however, Caccia never made any suggestion to Hall's management respecting third party dispatchers, because, as he put it—

> Well, until recently, I never heard much about third party, which has been mentioned a few times. I never used to . . . I never known of anybody else that used it, unless just recently I heard them talk of it".

Since the dispatch call to the road driver may come at any time after the mandated rest period, the unpredictability inherent in the telephone dispatch system tends to produce driver fatigue. This is demonstrated by the fact that a driver may spend an entire evening waiting for a call from the dispatcher, then go to sleep only to be awakened soon afterward by the dispatcher. *The evidence is overwhelming that the unpredictable telephone dispatch system used by Hall's inevitably results in the dispatch of fatigued drivers.* (Emphasis supplied)

Further contributing to the fatigue problem, is Hall's work rule which provides that road drivers at West Middlesex are not permitted to "book-off" (i.e., remove themselves from the dispatch roll) at the time of receiving a dispatch call by reason of fatigue or for any other reason.

Prior to January 18, 1981, a "book-off" was available on the basis of one 24 hour "book-off" a week, but it had to be requested during the mandated ten hour rest period, and it had to be taken immediately after the rest period was over. The 24-hour "book-off" privilege could be lost if a driver missed a dispatch call or "booked-off" at any other time. In addition to the 24 hour "bookoff", prior to dispatch, a driver could request a "book-off" because of sickness or an emergency, but such a "book-off", too, would mean a loss of the 24 hour privilege.

Since the no "book-off" at dispatch rule has no exception for fatigue, drivers at West Middlesex believe if they are fatigued at the time of receiving a call but refuse to take a load, this is considered a violation of the company's work rules and the basis of a disciplinary proceeding. This belief is well-founded since drivers have been warned that "book-offs" for fatigue at time of dispatch are a violation of Hall's work and dispatch rules. Because of Hall's no "book-off" at dispatch rule, fatigued road drivers at the West Middlesex terminal do not report that they are fatigued when they receive a dispatch call, and routinely take dispatches while in this dangerous condition.

On January 18, 1981, new "book-off" rules were formally issued at West Middlesex. Drivers still may not "book-off" at the time of a dispatch call, but with the prior consent of a dispatcher, a driver who is supposed to be available for dispatch may "book-off" in advance of dispatch for brief periods of time because of fatigue or for any other reason. According to Hall's, "book-offs" are not permitted at time of dispatch because the carrier claims that it might be accused by the union or its employees of playing "position" for favored runs. That is to say, if a driver could "book-off" at will, this device might be used to pick and choose the runs that will be accepted and which will be rejected.

Curtis Galloway, Director for Industrial Relations for Hall's, as well as present and former dispatchers, testified that, (a) the company does not knowingly dispatch fatigued drivers, and (b) Hall's would allow a "book-off" if it were reported to the company at time of dispatch that a driver was fatigued. But Galloway admitted that if a driver should report that he was fatigued at the time of a dispatch call, this would be considered a violation of the company's work rules, and might be used against him in a disciplinary proceeding. Moreover, since Galloway acknowledged that the obvious purpose of the rule was to dis-

courage "book-off," and since he further admitted that he knew that driver fatigue was a problem, his statement that he did not know that the inevitable effect of the no "book-off" rule was to discourage drivers from reporting fatigue when called for dispatch is not credible. It is found as a fact that high officials of Hall's must have known that the no " 'book-off' at dispatch rule" results in fatigued drivers taking to the road.

Finally, with respect to "book-offs" it should be noted that neither the earlier system (one 24 hour "book-off" at end of the rest period and "book-offs" for emergency and sickness only) nor the January 1, 1981 reforms (unlimited short "book-offs") lessen the unpredictability of telephone dispatch calls. "Book-offs" of any kind excuse the driver from being available. When the driver is supposed to be available, he is still subject to the unexpected telephone call and the two-hour reporting deadline.

The NMFA contains in Article 45 a grievance and arbitration procedure by which the parties governed by the agreement agreed to resolve all grievances, complaints or disputes by submitting them to that grievance and arbitration procedure.,

The grievance procedure of the NMFA provides for the resolution of disputes, which cannot be resolved by the parties themselves, by joint committees composed of representatives of the unions and employers covered by the NMFA. The joint committees referred to in the NMFA are the Western Pennsylvania Joint Area Committee and the Eastern Conference Joint Area Committee (hereinafter "ECJAC"). The ECJAC is a body created by the NMFA and consists of an equal number of Eastern Conference of Teamster delegates and employer-representative delegates.

Article 16 of the NMFA which prohibits employers from requiring employees to violate government regulations in regards to safety, reads in pertinent part, as follows:

> Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to person or property or in violation of any applicable statute or court order, or in violation of a government regulation relating to safety of person or equipment. The term 'dangerous conditions of work' does not relate to the type of cargo which is hauled or handled.

The NMFA, therefore has made a violation of federal safety regulations a breach of the contract.

As a result of the dispatch procedures employed by Hall's, Plaintiff Gaibis, in his capacity as union steward, on November 11, 1977, filed a grievance on behalf of all drivers of Defendant Company at its West Middlesex operation pursuant to the grievance procedure as set forth in Articles 45 and 46 of the NMFA. The grievance in pertinent part is as follows:

> Details: For the past six (6) years, up to and including the present time, employee drivers have been required to be constantly 'available or in service on-call' to the Company between loads, immediately following the completion of the federal required statutory 8 hour 'off-duty' rest period, at the risk of discipline. These employee drivers have been, in addition, required to log this time as off duty, when in reality, and pursuant to federal laws and regulations, this time should be logged as 'on duty not driving' and should be compensibe (sic). This is true because the drivers are literally required to be immediately available and must wait for work calls.
>
> Adjustment Requested: Regulate work week, or do not require availability, or permit this time to be com-

pensible. In addition, employees request back pay for all past time which they were required to log as off duty, when in fact they were 'in service on duty not driving.'

The grievance was processed at a meeting of the Western Pennsylvania Teamsters and Employers Join Area Committe and the result was a deadlock, thus causing an appeal to be taken to the "ECJAC".

The grievance was heard before the ECJAC on April 26, 1978, case no. R-90-78, at which time the Defendant Hall 'claimed the case was improperly before the committee as it was not subject to the grievance procedure and unrelated to the contract. Approximately one week later, on or about the early part of May, 1978, Plaintiff was notified that the ECJAC had sustained the company's position and dismissed the grievance by making the following decision:

"The panel in executive session, motion made, seconded and carried this case is improper (sic) before this Committee. No cost."

On or about January 4, 1978, a letter was sent to Plaintiff Lowry from Defendant Hall's suspending him for three days without pay for being "unavailable for dispatch", because he was not home on several occasions when he was "off duty" and called by Defendant Hall's. On or about January 10, 1978, a grievance was filed by Plaintiff Lowry charging that his suspension for "non-availability" was illegal and improper. After a deadlock on said grievance before the W. Pa. Teamsters & Employers Joint Area Committe, the grievance was appealed to the ECJAC.

The grievance was heard before the ECJAC on July 25, 1978, case no. R-90-78 and approximately one week later,

Plaintiff Lowry was informed that the ECJAC had upheld his suspension with the following decision:

"The panel in executive session, motion made, seconded and carried that based on the fact that Lowry was suspended for just cause, the claim of the union is denied. Cost to union."

On or about January 29, 1979, Plaintiff Lowry was discharged by the Defendant Company for "chronic and habitual absenteeism." A grievance was filed by the Union and subsequently decided by the Western Pennsylvania Teamsters and Employers Joint Area Committee (hereinafter WPTEJAC) on February 15, 1979, reinstating Plaintiff Lowry without back pay, and ordering the Defendant Company and the Union to settle the method of notifying the drivers of work opportunities.

On or about March 1, 1979, the Defendant Hall's in less than two weeks after Plaintiff Lowry was ordered reinstated, again discharged Lowry for "chronic and habitual absenteeism" based on a five or six day period of time. As a result of the March 1, 1979 discharge of Plaintiff Lowry for non-availability, the Defendant Company and the Union once again went through the grievance procedure and again, on August 29, 1979, the arbitrator ordered Plaintiff Lowry reinstated but without back pay.

On or about December 7, 1979, the Plaintiff Lowry received a letter from the Defendant Company dated December 4, 1979, informing him that once again he was being discharged for not being by his phone while "off duty" or "chronic and habitual absenteeism" as the Defendant Company called it.

On January 11, 1980, an arbitration hearing was held on the most recent discharge of Plaintiff Lowry and on January 14, 1980, the arbitrator issued an opinion upholding the discharge.

Plaintiff David Gaibis was notified by Hall's on May 2, 1980, that he was being discharged for chronic and habiutal absenteeism. This "chronic and habitual absenteeism", as has been the case on all other occasions when this phrase has been used relative to the matters raised herein, relates solely to "off duty" time.

A grievance was filed by the union on behalf of Plaintiff Gaibis on May 7, 1980, challenging his discharge as being illegal and in violation of the collective bargaining agreement. A hearing was held on the same date before the "WPTEJAC" at which time the discharge was upheld, without opinion.

Both of the named Plaintiffs, Gaibis and Lowry, were discharged as a result of the same alleged illegal dispatch procedure challenged in their Complaint. Other employees of Defendant Hall's who are similarly situated as Plaintiff Gaibis and Plaintiff Lowry, have been and continue to be suspended for alleged "non-availability" or "chronic and habitual absenteeism."

As a result of the discipline and threats of discipline by Defendant Hall's, Plaintiffs and others similarly situted were, in most cases, forced to remain home and be continuously and absolutely available for dispatch calls from the Defendant Hall's having no idea when the calls might come. Plaintiffs and others similarly situated logged said time as off duty only because Defendant Hall's required them to so log the time at the risk of discipline.

Discussion and Conclusions

Logging and Dispatch Procedure

In certifying the question related to the transportation issues in this litigation the court's objective was to gain the bnenefit of the BMCS's views before rendering a final

judicial decision. The primary jurisdiction doctrine allows the court, where a claim is orginally cognizable, to stay the procedings before it, maintain jurisdiction and certify the relevant issues to an administrative agency with special competence so the court may avail itself of the agency's expertise. *Driving Force, Inc. v. Manpower, Inc.,* 538 F. Supp 57 (D.C. Pa. 1982); *Levitch v. Columbia Broadcasing System, Inc.,* 495 F. Supp. 649 S.D. N.Y. 1980)

This Court never relinquished its jurisdiction in this matter, and so stated in its Order of April 27, 1981, that certified the question to the administrative agency. By invoking the primary jurisdiction doctrine this Court will now be able to take full advantage of the BMCS's expertise in reaching a final decision.

While the Court recognizes that the BMCS and its reviewing officials have special competence in matters pertaining to the regulation of the trucking industry, this court is not bound by the decisions rendered as a result of the administrative process. There being no material factual disputes between the parties, the sole contention is the construction of the BMCS regulations as they pertain to the road drivers computation of their hours of service.

It is clear that when a decision turns on the meaning or construction of words in a statue or regulation, as in this case, then a legal question is presented for the court to decide. *International Society for Krishna Consciousness, Inc. v. Rochford,* 425 F. Supp. 734 (N.D. Ill. 1977), *aff'd* in part, reversed in part 585 F.2d 263 (7th Cir. 1978).

Accordingly, this court, though mindful of the beneficial views of the administrative agency, has the duty to construe the BMCS regulations in making a final decision, and is not bound by the decisions rendered through the administrative process. At most the court is required to give what it deems to be "appropriate weight" to the decisions rendered by the BMCS and its reviewing offi-

cials. *International Ass'n of Heat and Frost Insulators and Asbestos Workers v. United Contractors Association,* 483 F.2d 384 (3rd Cir. 1973), amended, 494 F.2d. 1353 (3rd Cir. 1974).

As the Supreme Court directed in *Bread Political Action Committee v. Federal Election Commission,* 455 U.S. 577, 102 S. Ct. 1235 (1982), a court must begin its analysis of an isue of statutory construction with the plain language of the statute itself. Administrative regulations, for construction purposes, are treated no differently than statutes and the same rules of construction are applicable in both instances. *Rucker v. Wabash Ralilraod, Co.,* 418 F.2d 146 (7th Cir. 1969), *New Ikor, Inc. v. McGlennon,* 446 F. Supp. 136 (D.C. Mass. 1978). The plain language of the regulations and the ordinary meanings of the words therein are the starting points in construing the regulations and will be determinative unless there is an apparent ambiguity or expression of legislative intent to the contrary. *Bread Political Action Committee,* 455 U.S. at 580.

The regulations in question that the Court must construe defines "on duty" time as it applies to the time spent by road drivers waiting for dispatch calls after the mandatory rest period. Up until the final decision rendered by the Associate Administrator for Safety, (as a result of this Court's request for guidance), on-duty time was defined as "[all] time from the time a driver begins to work or is required to be in readiness to work until the time he is relieved from work and all responsibility for performing work." FMCSR § 395.2(a).

The definition of on duty time contained in the regulation has been interpreted, officially and unofficially, by the FHWA. The official interpretation is contained in the document published in the Federal Register on November 23, 1977, 42 Fed. Reg 60078, Nov. 23, 1977. The interpretation states:

> The purpose of this rule is to allow the driver opportunity to obtain adequate rest. This means that he must be relieved of all responsibility from work and be free to use the time effectively for his own purposes during the specified period of time.
>
> "When a driver is required by a motor carrier to personally stand by to receive a telephone notice to report to work, following a required off duty period, and the driver does in fact stand by, he meets the requirements of § 395.2(a) and such time must be logged as on duty time."

A number of unofficial interpretations have been issued concerning telephone availability. One informal interpretation issued to Mr. Gaibis on September 22, 1977, states that a driver is on duty if the company requires him to personally be present at a particular point with no option to have someone else receive the message for him and no option to change the contact point. A similar interpretation was issued by former Federal Highway Administrator Bowers on July 13, 1979. Mr. Bowers said [a] driver is not considered to be on duty if a third party may take a message for him, or if he is free to move around, but must keep the carrier notified as to where he can be reached."

On March 29, 1982, the Associate Administrator for Safety issued a new interpretation of the regulation overruling the prior interpretations of the regulation. The new interpretation stated that "[i]f the employer generally requires its drivers to be available for call after a mandatory rest period which complies with the regulatory requirement, the time spent standing by for a work related call, following the required off-duty period, may be properly recorded as off-duty time." The reasoning offered by the Administrator was that since the freedom to rest is the objective purpose of the FMCS regulations, "[t]he fact that a driver must also be available to receive a call

in the event the driver is needed at work, even under the threat of discipline for non-availability, does not by itself impair the ability of the driver to use this time for rest."

The plain language of the regulation defining on-duty time expressly includes the factual situation where a driver is "required to be in readiness to work". The official interpretation of the regulation issued in November of 1977, acknowledges that when a driver is personally required to stand by to receive a dispatch call, the driver meets the requirements of being on-duty under the regulation. This interpretation of the regulation comports with the ordinary meaning of the words "in readiness to work". As long as the road driver is personally required to be at a particular site after the mandatory rest period so the dispatcher can contact the driver for a work assignment, the time spent waiting for the dispatch call is on duty time as defined in the FMCSR at 395.2(a).

The unofficial interpretations of the regulation suggest that if the road driver was allowed to change contact points where he/she could receive the dispatch calls, then the time spent waiting would not be considered on-duty time. This Court disagrees with this conclusion because the site where the driver receives the dispatch call does not alter the factual situation of a driver being personally at a contact point waiting for the dispatch call. Where the driver is personally required by the Defendant to stand by at any contact point to receive a dispatch call, he/she is waiting in readiness to work and therefore this time should be logged as on-duty time according to the plain language of the regulation.

Hall's could have employed alternative methods for contacting its road drivers for work assignments rather than have its drivers personally stand-by to receive dispatch calls. A working third party dispatch procedure is such an alternative. The facts in this case establish that Hall's

has not adopted an alternative dispatch procedure that is utilized in any systematic or consistent pattern as part of the company's practice or procedure.

The evidence presented in the administrative hearings does not support Hall's contention that it had established a working third party dispatch procedure that relieved the road drivers of the responsibility of personally waiting for dispatch calls.

The lack of a viable alternative dispatch procedure, such as the third party dispatch procedure, when combined with Hall's policy of requiring its drivers, under the threat of disciplinary action, to log the time they personally spent waiting for a dispatch call as off duty time amounts to a violation of the FMCSR at 49 CFR 395.8. Hall's is in violation of 49 CFR 395.8 because it unlawfully requires its road drivers to improperly log their time as "off duty" when said time should be logged as "on duty". Where the company requires the drivers to personally wait by the telephone for a dispatch call and the driver does in fact wait for a work call, the time spent waiting must be logged as on duty time for which the driver must be compensated. If the driver is not personally required to stand by to receive the dispatch call, he/she is considered to be relieved from work and relieved of all responsibility for performing work and is free to use the time effectively for his/her own purposes.

This Court must also consider another FMCS regulation, 49 CFR 392.3, to determine if Hall's dispatch procedures violate the provisions concerning the safe operation of a motor vehicle by the road driver. That regulation prohibits a driver from operating or a motor carrier from requiring or permitting a driver to operate a motor vehicle while the driver's ability or alertness is so impaired through fatigue, illness, or any other cause, as to make it unsafe for him to begin or contnue the operation of the motor vehicle.

49 CFR 392.3. This Court concludes that Hall's has violated FMCS regulation § 392.3 by virtue of its work rule and practice that a driver may not "book off" at the time of dispatch. This Court adopts the reasoning of the Administrative Law Judge, as set forth below, to support its determination that a violation of 49 CFR § 392.3 has occurred.

FMSCR § 392.3 emphatically prohibits the dispatch of fatigued drivers irrespective of the cause and notwithstanding the role which the drivers themselves may play in producing this dangerous condition. The position of BMCS on this point is clear:

> Regulations cannot provide a complete solution to the problem of driver fatigue and its effect on safety of operations. The manner in which a driver may spend his time off duty is beyond the scope of the FMCSR, although some of his off-duty activities may tire him as much as any work for his employer. The responsibility is the driver's to assure himself of adequate rest and sleep. Likewise, it is the employer's responsibility to establish and apply effective management techniques to ensure that drivers are not dispatched in a fatigued condition, nor that off duty rest is not routinely disturbed by notifications for reporting for the next tour of duty.

Hall's argues that because the drivers do not report fatigue at time of dispatch, it has no knowledge of this condition, but had the company been properly apprised, "book offs" for fatigue would have been allowed. This argument is not convincing. For one thing, the drivers who appeared in [the administrative] proceeding, whether called by Gaibis and Lowry or Hall's, testified that they do not report their fatigued condition when a dispatch call is received for the very reason that "book offs" at that time for any reason are not allowed. Second, considering

the fact that Hall's knew that operator fatigue was a problem, and yet it explicitly warned drivers that "book-off" for this reason at time of dispatch was a violation of the company's work rules, it is fair to conclude that whatever gaps exist in the company's lack of knowledge about specific incidents of fatigue are largely of the company's own making. Besides, even if it were believable that Hall's had no knowledge that fatigued drivers generally were being dispatched (which is contrary to [the] specific finding that high company officials must have known the consequences of its no "book-off" rule), it is significant that FMCSR § 393.3 does not adopt a "knowingly permit" standard—its says "a motor carrier shall not require or permit" the dispatch of a fatigued driver. Since this is a safety regulation, which should be liberally construed, *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980), "permit" in this context should be read as meaning that the carrier may not create a condition which makes the forbidden conduct possible. This is precisely what Hall's has done with its no "book-off" rule.

In addition to the direct prohibition against permitting fatigued drivers to operate a motor vehicle, FMSCR § 390.32 requires carrier "observance" of all safety rules including § 392.3. Contrary to the standard definition, Hall's defines "observance" to mean closing its eyes and doing nothing about the obvious fatigue problem. Certainly, it is the exact anti-thesis of a safety regulation for a carrier to establish work rules which arbitrarily assume that drivers will not be fatigued at time of receiving a dispatch and thereby discourages drivers from reporting their true condition should they in fact be fatigued. Finally, "observance" minimally connotes that a carrier knows what apparently every driver in the industry knows—namely, that by prohibiting "book offs" at dispatch time it is permitting fatigued drivers to take to the road.

Arbitration Awards

At the outset the Court acknowledges the stringent standard of review that limits the Court's role in considering an arbitrator's award. Where the parties have entered into a collective bargaining agreement that adopts arbitration as the method of dispute resolution, as in this case, "it is the arbitrator's construction of the contract which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the Courts have no business overruling it because their interpretation of the contract is different from his." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 1593, 599 (1960). The arbitrator in making an award is bound by the terms of the collective bargaining agreement and the award rendered is legitimate only so long as it draws its essence from the agreement. *United Steelworkers of America v. Enterprise, Supra; Mobil Oil Corp. v. Independent Oil Workers Union*, 697 F.2d 299 (3rd Cir. 1982).

The Third Circuit has further emphasized that the reviewing court is to give great deference to an arbitrator's award and may only disturb the award where there is a manifest disregard of the collective bargaining agreement, totally unsupported by principles of contract construction and the law of the shop. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969). It is clear that this Court's review of the arbitrator's award is narrow and the award may not be disturbed because this court would have construed the bargaining agreement in a different manner.

A reviewing court may under certain circumstances however may vacate an arbitration award despite the limited standard of review. The court in *Ludwig* listed several circumstances that would warrant an arbitrators award being overturned. Two of those circumstances are relevant in this case: First, where the award violates specific com-

mand of some law and, second, where the award is inconsistent with public policy. 405 F.2d 1128-1129 n.27.

In light of this court's earlier discussion and conclusion that Hall's dispatch and logging procedure violates the FMSCR, as it relates to the proper logging of on-duty time and that said improper logging procedure ignores the fatigued condition of its drivers by encouraging said tired drivers to go out on the road, it necessarily follows that the arbitrator's awards upholding the validity of Hall's dispatch and logging procedure are inconsistent with the government regulations and violate the public policy underlying the regulations. The awards rendered by the arbitrators and challenged by the plaintiffs in this action will be vacated because the awards violate the specific command of the FMCSR and are inconsistent with the public policy of the FMCSR to promote safe and proper use of the highways by road drivers. *Kane Gas Light & Heating Co. v. International Br. of Firemen*, 687 F.23 673 (3rd Cir. 1982).

STATUTE OF LIMITATIONS

Defendant Hall's contends that the Plaintiffs' claim are barred by the statute of limitations because the original complaint in this civil action was not filed until October 23, 1978, considerably after the applicable three month statute of limitations, 5 P.S. § 173, for actions to vacate an arbitrators award had expired. The Court concludes that the Plaintiffs claims are not time barred because the October 23, 1978 Complaint was filed within the three month statutory period following the arbitration award dated July 25, 1978, which upheld the suspension of Plaintiff Lowry.

Since the identical issues, i.e., Plaintiffs' challenging the validity of Hall's logging and dispatch procedure, are involved in each of the arbitration awards in this litigation,

the Court can properly adjudicate all of the claims since the Plaintiffs' timely filed their complaint seeking to vacate the July 25, 1978 arbitration award before the three months period had expired. Furthermore, both Plaintiffs, Gaibis and Lowry, promptly filed applications for preliminary injunctions invoking this Court's jurisdiction after they were discharged challenging the awards that upheld their terminations under Hall's dispatch and logging procedure. Gaibis filed for a preliminary injunction the same day he received notice of the arbitration award, and Lowry filed for a preliminary injunction within two weeks after he received notice of the award upholding his discharge.

FAIR LABOR STANDARDS ACT

Plaintiffs have alleged that Defendant Hall's has violated the Fair Labor Standards Act because they and other road drivers similarly situated are not being paid for time spent working for Hall's that is logged as off duty time under the company's logging procedure when such time is in fact on-duty time for which they should be compensated. The Court agrees with the Defendant that the two relevant provisions of the Fair Labor Standards Act that could apply in this action are 29 U.S.C. §§ 206 and 207.

Section 206 sets the minimum wages an employer shall pay an employee who in any work week is engaged "in commerce . . . ." The Plaintiffs' Complaint does not allege that the total weekly wage paid by Hall's fails to meet the minimum weekly requirements provided for under the statute which would be a violation of Section 206. The general statement that Hall's has violated the Fair Labor Standards Act by virtue of its dispatch and logging procedure is not enough to establish a claim for an employers violation of the minimum wages provision of the Act. Plaintiffs have not plead sufficient factual allegations to support their entitlement to relief under Section 206 of the Act. The Plaintiffs have not properly stated a claim under § 206

because they have failed to state with particularity how Hall's has violated the minimum wage provision of the statute.

As to Section 207 of the Act, which establishes the maximum number of hours an employee can work, the Plaintiffs cannot properly establish a claim to relief under this section because Defendant Hall's is exempt from the provisions of Section 207. Defendant Hall's is exempt from Section 207 because Plaintiffs are over-the-road drivers subject to maximum hours of service regulations set by the Secretary of Transportation pursuant to the provisions of 49 U.S.C. § 304. *Morris v. McComb,* 332 U.S. 422, 92 L Ed. 44 (1947); *Brennan v. Schwerman Trucking Co.* 540 F.2d 1200 (4th Cir. 1976), 29 U.S.C. § 213(b)(1).

Plaintiffs cannot, in light of the statutory exemptions, properly state a claim upon which relief can be granted under section 207 of the Fair Labor Standards Act.

JUDGMENT AND ORDER

AND NOW, this 6th day of JUNE, 1983, based upon the foregoing findings of fact and conclusions of law, IT IS ORDERED, ADJUDGED and DECREED the following:

1. Defendant's Motion for Summary Judgment is denied except for that part of the Motion which addresses Plaintiffs' claim under the Fair Labor Standards Act. Defendant is granted partial Summary Judgment in that Plaintiffs have failed to properly state a claim upon which relief can be granted under the provisions of the Fair Labor Standards Act.

2. All arbitrator's awards which have heretofore upheld the validity of the Defendant's dispatch and logging procedures as hereinabove discussed are here and now vacated.

3. All arbitrator's awards that have heretofore upheld the discharge of and the disciplining of Plaintiffs Gaibis, Lowry and others similarly situated for "non availability", and/or chronic and habitual absenteeism arising out of the Defendant's rule requiring the Plaintiffs and the Plaintiff-class to be in continuous readiness for work while they are off-duty are here and now vacated.

4. The Defendant is here and now permanently enjoined from requiring the Plaintiffs and the Plaintiff-class to be continuously available for work while they are off duty and especially during the hours required for their proper rest.

5. The Defendant may formulate reasonable rules requiring Plaintiffs and the Plaintiff class to be in continuous readiness for work while waiting for a dispatch under the following conditions:

a) That a driver who is off duty shall not be required to be available for readiness to work until he has had eight consecutive hours of off-duty time, and has "booked on" on as being available for work, and

b) That once a driver is "booked on" as being available for service, even though he is not on the Defendant's premises, he shall be paid the applicable hourly rate pursuant to to the collective bargaining agreement for all hours spent in continuous readiness for work if at the request of the Defendant employer, the said driver is instructed by the Defendant's dispatcher to stand by until called. When a driver receives a "stand-by" instruction he will log "in service, on duty, not driving".

6. That Plaintiffs and all others similarly situated who have lost time by suspension and/or discharge as hereinabove referred to, shall be compensated for all lost wages that would have been paid to them for on duty time pursuant to the collective bargaining agreement, but for said

disciplinary action of Defendant. The Plaintiffs and the Plaintiff- class shall not be paid for the hours heretofore spent off active duty while waiting for a call from the Defendant for a dispatch in service for the reasons set forth in the opinion annexed hereto, and for the further reason that said time due to a obvious lack of a uniform and accurate system of recording, would be impossible to accurately calculate. An award to Plaintiffs for this time lost while waiting to be called in the past, would be at most speculative and conjectural.

7. Defendant is permanently enjoined from disciplining, suspending, and/or discharging any of its drivers including the Plaintiffs and the Plaintiff-class, for "booking off" at the time of dispatch, if, in the opinion of said drivers they are fatigued, ill or otherwise physically unable to safely perform their driving duties. Any "in service on duty not driving time" logged by such driver immediately prior to "booking off" because of fatigue, illness and/or other physical disability shall not be compensable.

8. This Court will entertain within ten (10) days of this date a Petition from the Plaintiffs requesting an award for costs and reasonable attorneys' fees. After Defendant has answered said fees and cost petition within ten days of filing the same, a hearing will be held in regard to said petition on July 11, 1983, at 3:30 o'clock, P.M., E.D.S.T., in Court Room No. 5, United States Post Office and Court House, Pittsburgh, Pennsylvania.

/s/ PAUL A. SIMMONS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5468

(C.A. No. 78-1211)

CAROL JEAN VOSCH, Executrix of the
Last Will of Charles Lowry, deceased
DAVID GAIBIS and others similarly situated,

v.

WERNER CONTINENTAL, INC.,
Appellant

SUR PETITION FOR REHEARING IN BANC

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and KELLY, *District Judge**

The petition for rehearing filed by Appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

By the Court,
/s/ ARLIN M. ADAMS
Circuit Judge

Dated: Jun 29 1984

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* As to panel rehearing only.

[Received and Filed 6-29-84 Sally Mrvos Clerk]

No. 84-688

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CAROL JEAN VOSCH, executrix of the last will of CHARLES LOWRY, deceased, DAVID GAIBIS, and others similarly situated,

Petitioners

v.

WERNER CONTINENTAL, INC.

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether an individual employee may institute a civil action against his employer under Section 301(a) of the Labor Management Relations Act, as amended, 29 U.S.C. §185(a), seeking to vacate a final and binding arbitration award in the absence of any allegation of a breach of the duty of fair representation by his union in the course of the arbitration proceedings?

PARTIES TO THE PROCEEDING

Respondent Werner Continental, Inc. was acquired by Hall's Motor Transit Company on January 1, 1979, and the companies thereafter have done business as a single entity known as Hall's Motor Transit Company (hereinafter referred to collectively as "Hall's"). Hall's is a wholly owned subsidiary of Tiger International, Inc. Petitioners are Carol Jean Vosch, executrix of the estate of Charles Lowry, a former employee of Hall's, and David Gaibis, another former employee of Hall's.

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No. 84-688

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CAROL JEAN VOSCH, executrix of the last will of CHARLES LOWRY, deceased, DAVID GAIBIS, and others similarly situated,

Petitioners

v.

WERNER CONTINENTAL, INC.

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CITATION OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit has been reported at 734 F.2d 149 (3d Cir. 1984). The Opinion of the United States District Court for the Western District of Pennsylvania has been reported *sub nom Gaibis v. Werner Continental, Inc.*, 565 F.Supp. 1538 (W.D. Pa. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1984 and a petition for rehearing in banc was

denied on June 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §185(a), June 23, 1947, c. 120, Title III, §301(a), 61 Stat. 156:

> Suits by and against labor organizations (a) Venue, amount, and citizenship
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §173(d), June 23, 1947, c. 120, Title II, §203(d), 61 Stat. 153, as amended Pub.L. 95-524, §66(c)(1), October 27, 1978, 92 Stat. 2020:

> (d) Use of conciliation and mediation services as last resort.
>
> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .

STATEMENT OF THE CASE

Hall's is a common freight carrier which operates a number of trucking terminals throughout the eastern half of the United States.[1] Prior to their discharge, Gaibis and Lowry were employed as over-the-road truck drivers dom-

1. As noted above, Werner Continental, Inc. shall be referred to herein as "Hall's".

iciled at Hall's West Middlesex, Pennsylvania freight terminal. They were members of Teamsters Local 261, and were subject to the provisions of the collective bargaining agreement known as the National Master Freight Agreement and Teamsters Joint Council No. 40 Over-The-Road Supplemental Agreement. That collective bargaining agreement contains a comprehensive grievance and arbitration procedure, which culminates in a final and binding decision either by a joint union/management committee or by an independent arbitrator.

Gaibis and Lowry were employed subject to work rules which involve, *inter alia*, a seniority-based dispatch procedure. Pursuant to that procedure, over-the-road drivers are called for dispatch based on seniority, and are required to appear for work within two hours after receiving telephone notification of dispatch. The collective bargaining agreement expressly authorizes discipline, up to and including discharge, for "chronic and habitual absenteeism." That phrase has been consistently interpreted by the joint committees created by the labor contract as including chronic unavailability for telephone dispatch. After a long history of progressive discipline, both Gaibis and Lowry were eventually discharged for chronic and habitual absenteeism, as a result of their continued refusal to make themselves available for work. The discharges were upheld in final and binding decisions under the grievance and arbitration procedure of the contract.

For many years prior to his discharge, Gaibis had complained in letters to the Bureau of Motor Carrier Safety ("BMCS"), an agency of the Federal Highway Administration of the Department of Transportation, that Hall's dispatch procedure, as well as its mandated procedures for the maintenance of a road driver's daily log book, violated the Federal Motor Carrier Safety Regulations ("FMCSR"). Several investigations of Hall's dispatch and logging procedures were precipitated as a result of the complaints of Gaibis, and in each case Hall's

was found to be in complete compliance with the FMCSR. Neither Gaibis nor Lowry ever filed a formal complaint against Hall's with the BMCS prior to instituting this action in the district court.

The action in the district court was commenced on October 23, 1978. The Complaint, as thereafter amended, alleged that Hall's dispatch and logging procedure, as well as the discipline taken by Hall's for chronic and habitual absenteeism, including the discharges of Gaibis and Lowry, violated the collective bargaining agreement, the Interstate Commerce Act, and the FMCSR. The Complaint sought, *inter alia*, an order vacating all of the arbitration awards in question, an award of back pay and other appropriate relief to the affected employees; reinstatement of Gaibis and Lowry; and an order enjoining Hall's from violating the FMCSR. Hall's moved to dismiss the original Complaint and all subsequent amendments to it. It also sought, alternatively, an Order from the district court deferring the regulatory issues raised by the Complaint to the BMCS under the doctrine of primary jurisdiction. On April 27, 1981, the district court granted that aspect of the Motion, and referred certain issues to the BMCS for resolution in accordance with its Rules of Practice and Procedure.

Pursuant to the court's order, an administrative law judge conducted a hearing on those issues in September, 1981, at which all parties were given the opportunity to present testimony and written submissions. He thereafter filed a Recommended Decision on January 22, 1982. Both parties filed exceptions to the Recommended Decision, which was then reviewed by the Associate Administrator for Safety of the Federal Highway Administration, whose decision constitutes final agency action pursuant to the Rules of Practice and Procedure of the BMCS, 49 C.F.R. §386. The Associate Administrator issued a Final Decision on March 29, 1982, in which he concluded that Hall's dispatch and logging procedure was

in full compliance with the FMCSR.[2]

On a Petition for Reconsideration filed by Gaibis and Lowry, the final Decision was upheld by the Associate Administrator for Safety on May 27, 1982.[3]

The Final Decision of the BMCS was then transmitted to the district court. Contrary to the administrative decision, the district court concluded that Hall's procedures did violate the FMCSR, and that the arbitration awards upholding discipline under those procedures violated public policy. The court vacated all of the arbitration awards, ordered reinstatement and back pay to Gaibis, Lowry, and other unidentified employees, and ordered Hall's to implement a new dispatch and logging procedure created by the court.

The Court of Appeals vacated the district court's decision on the ground that Gaibis and Lowry had failed to state a claim upon which relief could be granted. In its Opinion by the Honorable Arlin M. Adams, the court below concluded that Gaibis and Lowry lacked standing to initiate an action seeking to overturn the arbitration awards for the reason that they had not alleged that the union breached its duty of fair representation, or that the grievance procedure was inadequate. The court noted that the administrative procedure afforded by the BMCS and the FHA, 49 C.F.R. §386.12, constituted the appropriate forum within which Gaibis and Lowry could have lodged their complaints concerning the dispatch and logging procedure.

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2. This Decision is included within the Appendix for Respondent, commencing at page A-1.

3. The Decision on the Petition for Reconsideration is included within the Appendix for Respondent, commencing on page A-35.

REASONS FOR DENYING THE WRIT

A. Summary of Argument

Petitioners assert that, contrary to the decision of the Third Circuit, an individual employee should be permitted to bypass his collective bargaining representative and to seek to overturn an arbitration award for reasons of public policy without alleging a breach of the duty of fair representation. Petitioners therefore request that certiorari be granted, on the grounds that prior decisions of this Court and other Courts of Appeals conflict with the holding of the Third Circuit. Alternatively, Petitioners seek review of the Third Circuit's decision in order to settle an issue which they allege has not been addressed previously by the Court.

Hall's respectfully submits that certiorari should not be granted in this case. This Court and the Circuit Courts have consistently and repeatedly held that an individual employee must be bound by the results of the grievance procedure unless he can establish that he was not fairly represented by his union in that procedure. Any other result would undermine the integrity of the collective bargaining process and the exclusive bargaining status of his union representative. These principles have been followed by every Court of Appeals which has considered the nature of the remedies available to an aggrieved employee under a collective bargaining agreement. Therefore, no conflict exists between the decisions of this Court, or any Court of Appeals, and the decision of the Third Circuit.

The fact that Gaibis and Lowry seek to overturn the arbitration awards in question on the basis of public policy does not affect this result. Although a union may assert a violation of public policy as one of a number of grounds for the vacating of an arbitral decision, this right is inherent in the union's status as exclusive bargaining representative. An employee, on the other hand, may ob-

tain such relief only if his union fails to represent him fairly. An employee should not be permitted to circumvent his collective bargaining representative, or to bypass the available statutory or administrative remedies for the asserted breach of public policy, in the guise of reviewing an arbitration award. Accordingly, this Court should deny the instant Petition for a Writ of Certiorari.

B. The Decision of the Third Circuit Is Consistent With Prior Decisions of This Court

Petitioners acknowledge that prior decisions of this Court clearly establish the general rule that an employee must allege a breach of the duty of fair representation in order to maintain an action against his employer to vacate an arbitration award. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); *Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-571 (1976). They nonetheless suggest that the holding of the Third Circuit below is in conflict with a number of decisions of this Court. Their Petition, however, fails to articulate the nature of that conflict. Indeed, there is no conflict; this Court has never held that an individual employee has standing to institute an action to vacate an arbitration award on public policy grounds, or on any other grounds, in the absence of an allegation of a breach of the duty of fair representation by his collective bargaining representative. The decision of the Third Circuit in the instant matter is fully consistent with prior decisions of this Court, including all of those cited in the Petition, as well as the federal labor policies underlying those decisions.

Congress declared in 1947 that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes . . . ." 29 U.S.C. §173(d). To effectuate that legislative policy, this Court long ago held that an employee must attempt use of the contract grievance procedure before seeking

relief in the courts under section 301. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).[4] A contrary rule

> would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements.'

Id. at 653, *quoting, International Brotherhood of Teamsters, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

This Court has further recognized that once a grievance has been processed through final and binding arbitration, the arbitration decision must be accorded finality in order that "the means chosen by the parties for settlement of their differences under a collective bargaining agreement [be] given full play." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960). Thus, a court is generally not permitted to review the merits of an arbitrator's decision; any other principle would permit the court to substitute its judgment for "the arbitrator's construction which was bargained for," *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

The Union or the employer may seek to vacate an arbitration award only under narrow circumstances, *e.g.*, where the award does not draw its "essence" from the collective bargaining agreement. *Id.* at 597. The decision to seek to overturn the award, like the prior decision to

4. As noted by Petitioners, the Court did recognize that an employee could file suit individually against his employer under section 301 in *Smith v. Evening News Assoc.*, 371 U.S. 195, 198-200 (1962). However, that case did not involve a collective bargaining agreement which contained a final and binding grievance and arbitration procedure.

submit the grievance to arbitration, must be made on the employee's behalf by the union. This principle arises from a second critical policy of federal labor law, which accords a union exclusive bargaining representative status after its election by a majority of employees in the bargaining unit. If the union is to act effectively in that role, it must be permitted to exercise its judgment, subject to a duty of fair representation, in the handling of employee grievances in order to permit it "to participate actively in the continuing administration of the contract." *Republic Steel Corp. v. Maddox, supra*, 379 U.S. at 653. As the Court has noted,

> The settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing employees in the enforcement of that agreement . . . .
>
> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the grievant to the vagaries of independent and unsystematic negotiation.

Vaca v. Sipes, 386 U.S. 171, 191 (1967). If an employee were permitted to take his claim to arbitration, or to seek to overturn the arbitration award without consent of the union, the union's status as exclusive bargaining representative and the stability of the collectively negotiated procedures would be jeopardized. *See DelCostello v. International Brotherhood of Teamsters, supra; Hines v. Anchor Motor Freight, Inc., supra.*

The employee is not left without a remedy, however, if the employer repudiates the grievance procedure or if the union fails to represent the employee fairly. In such

cases, the employee may seek to overturn an otherwise final decision arising from the grievance procedure. *Vaca v. Sipes, supra*, 386 U.S. at 185. As stated by the Court:

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract.

Hines v. Anchor Motor Freight, Inc., supra, 424 U.S. at 567.

The Third Circuit, in its Opinion below, followed the same principles of federal labor law, and adopted the same accommodation of competing interests, as has this Court in its prior decisions. The court below noted that the discharges of Gaibis and Lowry had been upheld in final and binding decisions, and that Petitioners had not alleged a breach of the duty of fair representation. As a result, Gaibis and Lowry could not challenge those decisions in the absence of an allegation that the integrity of the decisions was marred by a breach of the duty of fair representation. In so doing, the court below followed the long standing principle that a federal court should not interject itself into the collective bargaining process, where that process and the parties have functioned properly and fairly.

The Third Circuit also noted that the objections of Gaibis and Lowry to Hall's dispatch and logging procedure, which are statutory in nature, could have been presented through the procedures available under the FMCSR. 734 F.2d at 155 n.11. In so doing, the court below quite properly recognized the distinction between contractual and statutory violations. The arbitration awards in question held only that the actions of Hall's did not violate the contract; they dealt not at all with any statutory violation. *See Barrentine v. Arkansas Best Freight System*, 450 U.S. 728, 737 (1981). It would have

been inconsistent with all of the federal labor law policies discussed *supra* if the Third Circuit had permitted individual employees to impose on the parties to the contract a right or obligation founded not on their negotiation and agreement, but on the employees' view of what public policy demands those rights or obligations should be. If such a decision is to be made, it should be made by the union, the party responsible for the administration of the labor contract. An employee's statutory rights should be protected and enforced through statutorily created remedies.

Hall's submits that the accommodation struck by the Third Circuit is consistent with prior decisions of the Court, and furthers the critical labor principle that the union, and not an individual employee, is to be afforded full and unfettered authority to administer the collective bargaining agreement, subject always to a duty of fair representation. Accordingly, Hall's respectfully submits that the Petition for Certiorari should be denied.

C. The Decision of the Third Circuit Is Not In Conflict With Any Decision of Another Court of Appeals

Petitioners have cited several decisions of other Courts of Appeals which they allege are in conflict with the decision below, including an earlier decision by the Third Circuit. Upon careful review of these decisions, however, it is apparent that no Court of Appeals has adopted the view of the law espoused by Petitioners, and that no conflict exists with the decision of the Third Circuit.

As noted by Petitioners, several Courts of Appeals have recognized that an arbitrator's award may be overturned on the ground that the award violates public policy. *Perma-Line Corp. of America v. Sign, Pictorial & Display Union, Local 230*, 639 F.2d 890 (2d Cir. 1981); *World Airways, Inc. v. Teamsters Airline Division*, 578 F.2d 800 (9th Cir. 1978); *Ludwig Honold Mfg. Co. v. Fletcher*,

405 F.2d 1123 (3d Cir. 1969). These cases, however, involved a challenge by the union or the employer, rather than by an individual employee, to the arbitration award. As a result, the federal policies recognizing the exclusive representative status of the union and protecting the integrity of the collective bargaining process were not implicated in those decisions. Indeed, because those very policies were implicated in the instant case, the Third Circuit dismissed the employees' claim, despite its earlier decision in *Ludwig Honold Mfg. Co. v. Fletcher, supra*.[5]

Petitioners' principal argument appears to be that the Ninth Circuit has adopted a contrary position to that of the Third Circuit, citing *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577 (9th Cir. 1982), and *Garibaldi v. Lucky Food Stores*, 726 F.2d 1367 (9th Cir. 1984). In *Christianson*, however, the Ninth Circuit held that a union is not an indispensible party to a Section 301 action by an individual employee who has alleged a breach of contract by the employer and a breach of the duty of fair representation by the union. That holding is consistent with *Vaca v. Sipes, supra*, for the Ninth Circuit simply stated that "the employee may make any requisite showing of unfair representation by the union in his suit against the employer." *Christianson v. Pioneer Sand & Gravel Co., supra*, 681 F.2d at 580. Thus, the court in *Christianson* held that an individual employee need not actually name his union as a defendant in an action to

5. Petitioners also cite *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974) in support of their claim that an individual employee may seek to overturn an arbitration award based on public policy without alleging a breach of the duty of fair representation. That case involved the National Labor Relations Board's decision to defer to an arbitration award which had found cause for discharge. The court held that the deferral to arbitration was improper because the allegations of the unfair labor practice charges raised an issue concerning the existence of concerted activity, which were properly before the NLRB. The court therefore remanded the case to the Board for consideration of the statutory issue.

vacate an arbitration award, so long as he alleges that the union breached its duty of fair representation in connection with that award. *Christianson* therefore does not conflict in any fashion with the decision of the court below.

Garibaldi is equally unsupportive of Petitioners' position. In that case, the Ninth Circuit found that a state court wrongful discharge action based on an alleged violation of public policy was improperly removed to federal court on the basis of section 301. The court held that the alleged tort was unrelated to the collective bargaining agreement, and was not preempted by federal law. Therefore, although the employee was attempting to vacate a final and binding arbitration award, the court found that Section 301 was an inappropriate vehicle for such a claim.

Contrary to Petitioners' contention, the Ninth Circuit has rendered two decisions which are fully consistent with the decision of the Third Circuit in the instant matter. In *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), a case decided subsequent to *Garibaldi*, an employee claimed in a state court action that his discharge, which was upheld in final and binding arbitration, resulted from his complaints to the federal Mine Safety and Health Administration and the National Labor Relations Board, and therefore was in violation of public policy. The Ninth Circuit found that the case was properly removed to federal court pursuant to Section 301, and affirmed the dismissal of the claim by the lower district court. In so holding, the court stated:

> Olguin's exclusive remedies lay under the grievance procedures of the collective bargaining agreement and in federal remedies for retaliatory discharge. Olguin exhausted some of these remedies; he failed to pursue others in a timely fashion. He does not allege that his union breached its duty of fair repre-

> sentation; he therefore cannot maintain a Section 301 suit independent of the procedural requirements of the collective bargaining agreement.

Olguin v. Inspiration Consolidated Copper Co., supra, 740 F.2d at 1476.

The Ninth Circuit reached the identical conclusion in the earlier case of *Andrus v. Convoy Co.*, 480 F.2d 604 (9th Cir.), *cert. denied*, 414 U.S. 989 (1973), in which a group of employees sought to overturn an arbitrator's decision under Section 301, without alleging that they had been unfairly represented by their union. Citing a decision of the Fifth Circuit, the court held that

> employees cannot attack the final award, 'except on the grounds of fraud, deceit or breach of the duty of fair representation or unless the grievance procedure was a sham, substantially inadequate or substantially unavailable.'

Id. at 606, *quoting, Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971).

In addition to the Ninth Circuit, the Courts of Appeals for virtually every Circuit have agreed with the Third Circuit that a breach of the duty of fair representation is a condition precedent to an individual employee's action under Section 301 to overturn an arbitration award. *See, Early v. Eastern Transfer*, 699 F.2d 552, 555n.3 (1st Cir.), *cert. denied*, 104 S.Ct. 93 (1983); *Santos v. District Council of New York City*, 547 F.2d 197, 201 (2d Cir. 1977); *Ostrofsky v. United Steelworkers of America*, 273 F.2d 614, 614-615 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960); *Acuff v. United Papermakers and Paperworkers, AFL-CIO*, 404 F.2d 169, 171 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969); *Fortune v. National Twist Drill & Tool Division, Lear Siegler, Inc.*, 684 F.2d 374, 375-6 (6th Cir. 1982); *Warren v. International Brotherhood of Teamsters*, 544 F.2d 334 (8th Cir. 1976).

These decisions were based on the federal labor policies recognizing the exclusive representative status of the union, and favoring private dispute resolution, discussed above. In dismissing a claim by individual employees seeking to overturn an arbitration award under Section 301 without alleging a breach of the duty of fair representation, the Fifth Circuit stated:

> In order to effectuate the purposes of the labor statutes employees are empowered to organize. This, of course, has resulted in enormous benefits but entails certain burdens as well. One of these is that to some extent the interests of particular individuals are subordinated to the interests of the group both at the contract negotiation stage and thereafter . . . . This is necessary if a union is to function efficiently. As a result, a union may properly determine not to pursue a member's grievance to the arbitration stage at all . . . . *It would be paradoxical in the extreme if the Union, which is authorized to decide whether a grievance is to be pursued to the arbitration stage at all, could not be authorized to assume full responsibility for a grievance it did pursue, without the intervention of the individual union members immediately concerned.*

Acuff v. United Papermakers and Paperworkers, AFL-CIO, supra, 404 F.2d at 171 (emphasis supplied). Accordingly, the court held that the claim of the individuals could not be heard unless coupled with an allegation of unfair representation. *Accord, Early v. Eastern Transfer, supra*, 699 F.2d at 555 n.3 ("we disagree with appellants insofar as they contend that an employee may ordinarily secure judicial review of the merits of a decision by a joint committee, as opposed to an arbitrator, even if the union did not violate its duty of fair repre-

sentation.")[6].

In light of the overwhelming authority in support of the decision of the Third Circuit, and the lack of any conflict among the Circuits, Hall's respectfully submits that certiorari should not be granted in this case.

D. The Decision of the Third Circuit Does Not Involve an Important Question of Law Which Should Be Settled by This Court

Petitioners' final argument is that certiorari should be granted because the instant matter involves an important question of law which should be resolved by this Court. Specifically, they argue that the decision of the court below would permit an arbitration award to violate public policy, without any individual recourse to vindicate such a policy, if the union were to decide in good faith not to challenge the award. The facts of the instant case reveal, however, that Gaibis and Lowry did have an independent means to challenge Hall's dispatch and logging procedure, and that the administrative agency responsible for enforcing the federal regulations at issue found that Hall's had not violated those regulations. Accordingly, no important question of law is involved herein,

6. The Seventh Circuit has allowed a limited exception to this principle, where employees sought to intervene in order to confirm an arbitration award, and the union had no objection to the employees' action. In *F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union Local No. 781*, 629 F.2d 1204 (7th Cir. 1980), *cert. denied*, 451 U.S. 937 (1981), the district court had vacated an arbitration award which had reinstated three employees. Although the union had opposed the employer's action to vacate, it chose not to appeal the decision. The three employees thereafter sought to intervene in the action, in order to bring the appeal. The Seventh Circuit held that intervention was proper under those limited circumstances because intervention sought to strengthen the results of the grievance procedure, which were challenged by the employer. The court noted that intervention would not be appropriate, however, if the employees sought to overturn the award, or if the union opposed intervention. *Id.* at 1211-1212.

where Hall's procedures are consistent with the contract and with federal law.

In seeking to overturn their discharges, Petitioners allege that Hall's dispatch and logging procedures, upon which the discharges were based, violate public policy as embodied in the FMCSR. Gaibis and Lowry did not invoke the administrative remedies available under the FMCSR to challenge Hall's procedures, as the Third Circuit suggested they could do, under 49 C.F.R. §386.12. Instead, Petitioners sought to circumvent those specific remedies by articulating their claim as an action to overturn an arbitration award. It is perfectly clear, however, that Petitioners' claim is not premised on the collective bargaining agreement, but rather directly on the FMCSR; their claim is not *contractual*, it is *statutory*. Gaibis and Lowry cannot be permitted to avoid the careful administrative procedures established to resolve the identical safety issues which were the subject of the Complaint in the district court, simply by alleging a breach of contract premised on an alleged violation of public policy.[7]

Moreover, Petitioners' asserted claim that public policy has been violated by Hall's lacks support in the record. The Associate Administrator for Safety of the Federal Highway Administration expressly found that Hall's dispatch and logging procedures were in full compliance with the FMCSR, and that no threat to employee or public safety was presented (A-32). Indeed, the record shows that Hall's accident rate was under half of the national average for carriers of a similar size. *Vosch v. Werner Continental, Inc., supra*, 734 F.2d at 153 n.6. Gaibis and Lowry should not be allowed to circumvent their exclusive bargaining representative, and the grievance procedures established by the NMFA, simply by making an unsupported allegation of a public policy violation, which

7. Similarly, the Third Circuit concluded that Petitioners could not circumvent those administrative procedures by attempting to state a claim directly under the Interstate Commerce Act or the FMCSR. 734 F.2d at 153-154.

has been specifically contradicted by the agency responsible for ensuring the safety of the nation's trucking operations.

If Petitioners were permitted to maintain the instant action, any employee could avoid the restrictions inherent in the careful balancing of interests achieved by the federal labor law policies discussed herein, and disrupt the finality of labor arbitration awards, merely by invoking the words "public policy." Because virtually any arbitration award could be subject to such challenge, the federal policy favoring the rapid disposition of labor disputes would be eviscerated. *See, United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 63 (1981).

On the other hand, an employee in the position of Petitioners is adequately protected by his right to seek review of an arbitration award if the union fails to represent him fairly, *Vaca v. Sipes, supra,* 386 U.S. at 192, and by his right to pursue available administrative remedies independent of the labor contract. *See Olguin v. Inspiration Consolidated Copper Co., supra,* (employee had available federal statutory remedy for public policy claim; employee could not assert individual section 301 action without alleging breach of the duty of fair representation); *Local 453, IUEW v. Otis Elevator Co.,* 314 F.2d 25 (2d Cir.), *cert. denied,* 373 U.S. 949 (1963) (arbitration award reinstating employee could not be overturned based on violation of public policy which prohibits gambling; public policy upheld by application of criminal statute, not labor contract).

Hall's submits that the careful balancing of labor policies rendered by the Third Circuit, as well as all other Courts of Appeals that have considered the issue, and the availability of alternative remedies to Petitioners militate against the granting of certiorari in this case.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

In the Matter of	:	Docket No. 81-65C
GAIBIS & WERNER CONTINENTAL (HALL'S MOTOR TRANSIT COMPANY)	:	

FINAL DECISION

The Recommended Decision of Administrative Law Judge Morton Needleman was served on all parties on January 22, 1982. As Final Decisions on all disputed issues brought under 49 CFR Part 386 are in the province of the Associate Administrator for Safety of the Federal Highway Administration, a Notice of my intention to review the recommended decision was issued on February 3, 1982. Subsequently, the Director of the Bureau of Motor Carrier Safety petitioned for the same review, and included a statement of his position of the issues addressed in Judge Needleman's decision along with some of the information I requested in my Notice of February 3.

I have also reviewed the original Notice of Investigation containing a copy of the referral from the United States District Court for the Western District of Pennsylvania; the replies to the Notice of Investigation; the transcripts of the proceedings before the Administrative Law Judge and all exhibits entered in connection therewith; the Post-Trial Briefs and replies thereto filed by the parties; the Proposed Findings of Fact, Argument, and Conclusion of Law filed on behalf of the BMCS Director; the Recommended Decision; the Petition for Review and Brief submitted on behalf of the Director; the Exceptions and Memorandum of Plaintiffs Gaibis and Lowry, et al.; and the Exceptions of Hall's to Recommended Decision. As a result of this review, and for the reasons stated in

the opinion below, I have accepted much of the recommended decision of Judge Needleman, but conclude that I cannot agree in all its findings and conclusions, and have therefore substituted my own.

Accordingly, it is my Final Decision, in responding to the issue certified by the District Court, that the dispatch and logging procedure followed by Hall's Motor Transit Company (and its predecessor) for its over-the-road drivers at its West Middlesex, Pennsylvania terminal does not violate the Federal Motor Carrier Safety Regulations, 49 CFR §390.1, *et seq.*

I. Background

In October, 1978, two drivers, then employed by Werner Continental, Inc., brought an action in the United States District Court for the Western District of Pennsylvania on behalf of themselves and other drivers purported to be similarly situated charging, *inter alia,* that the logging and dispatch procedures practiced by their employer violated provisions of the Federal Motor Carrier Safety Regulations (FMCSR). Werner Continental, Inc. subsequently merged into Hall's Motor Transit Company and will hereinafter be referred to as Hall's. The Bureau of Motor Carrier Safety (BMCS) an agency in the Federal Highway Administration of the United States Department of Transportation, is charged with the responsibility of promulgating, administering and enforcing the FMCSR. In an Order, dated April 27, 1981, District Court Judge Paul A. Simmons determined that the assistance of BMCS was required to aid the Court in resolving the issue related to the FMCSR. Accordingly, the issue was framed and certified to BMCS "for investigation and resolution in accordance with its Rules of practice and procedure."

Thereafter, on May 12, 1981, in accordance with the Rules of Practice for Motor Carrier Safety Proceedings, 49 CFR Part 386, a Notice of Investigation was issued by

the Director of the BMCS. An Administrative Law Judge was appointed and a Hearing was held on September 14 and 15, 1981.

II. Issues

The question certified by the U.S. District Court in its April 27, 1981 Order was as follows:

> "Whether the dispatch and logging procedure followed by Hall's Motor Transit Company for its over-the-road drivers at its West Middlesex, Pennsylvania terminal violates the Federal Motor Carrier Safety Regulations, 49 CFR §390.1 et seq."

The Court also requested that in resolving this issue, guidance be provided with respect to six enumerated matters:

> a) Following a required off-duty period, if a driver is required to be constantly available, such as by personally standing by his telephone to receive a dispatch assignment, and if he may be subject to discipline for absenteeism for failing to personally respond to such telephone calls, how must such time be logged?
>
> b) If the employer requires the time in question "a)" to be logged "off-duty" does this violate Federal Motor Carrier Safety Regulations?
>
> c) If a driver who was subject to discipline for not being personally available as set forth in (a), above, logged time at home waiting for a dispatch call as "on-duty not driving", is such logging procedure in compliance with F.M.C.S. Regulations?
>
> d) If the company requires time spent in waiting at home, as set forth in a), to be logged as "off-duty", yet reserves the right to discipline drivers for alleged absenteeism for not responding to dispatch

calls during this period, does this violate F.M.C.S. Regulations?

e) Whether Hall's has properly required said over-the-road drivers to log as "off-duty" the period of time during which the driver is subject to receiving a dispatch call by telephone?

f) Whether Hall's dispatch and logging procedure violates the maximum hours of service provisions of the Federal Motor Carrier Safety Regulations set forth in 49 CFR §395.1?

III. Findings of Fact

1. Hall's and its predecessor, Werner Continental have been operating as an interstate common carrier of property out of as many as 75 terminals in several States, including the West Middlesex terminal in Pennsylvania for the period from at least 1970 through the present (Tr. 21A, 203, 332, 365, 544 and 575).

2. Hall's has employed between 30 and 125 over-the-road drivers at the West Middlesex Terminal at various times over the years. It currently employs 70. (Tr. 577, 722, 748)

3. The over-the-road drivers at West Middlesex are represented by Teamsters Local 261. Working conditions and compensation are governed by a collective bargaining agreement which is enforced through a grievance mechanism (Tr. 476-8)

4. The trucking business engaged in by Hall's is highly competitive and success depends upon the ability to provide fast and reliable service (Tr. 480, 574).

5. Hall's uses a telephone dispatch procedure to notify drivers when to report for work (Tr. 578, A-30, GX-9, GX-10, GX-11), which is the common practice in the industry (Tr. 479, HX 44C), and requires drivers to be "on call" and available to accept a run unless it is during the 10 hour rest period immediately following the comple-

tion of a run (Tr. 29A, 585, GX-9, 10, 11); during the latter part of a work week when the driver may not have sufficient eligible hours available to complete a run (Tr. 580, GX-9, 10, 11); during a 24-hour period following that rest period, if reserved during that 10-hour period (Tr. 32A, 805, GX-9, 10, 11); or when "booked-off" with the permission of the terminal manager. (GX-9, 10, 11, Tr. 660). Drivers must report to the terminal within two hours of telephone notification (GX-9, 10, 11).

6. Road drivers at West Middlesex terminal are dispatched according to a strict "hog seniority" system which means that the most senior driver eligible to be called for a run must be called before any junior driver regardless of the number of work hours already performed during the work week (unless, of course it would force a driver over the legal limits) (GX-9, 10, 11, TR. 581). An exception to this rule is "foreign power courtesy" which grants a preference to drivers from other terminals delivering loads to West Middlesex. The courtesy is reciprocated throughout the system (Tr. 39A).

7. Under the collective bargaining agreement, the drivers are guaranteed 45 hours pay ($382.95 in May of 1977), per work week regardless of the availability of work, so long as they work at least one full day (Tr. 66) and remain continuously available for work (GX-28A). This guarantee can be lost through nonavailability (GX-28A, TGr. 67).

8. Hall's is also required under the agreement to pay fringe benefits on behalf of drivers at the West Middlesex terminal, e.g., pension fund contributions of $52 per month and health and welfare contributions of $177 per month per driver, so long as the drivers work at least 30 hours in a 30-day month. (Tr. 494).

9. In the event a driver is called out of strict seniority order for a load by the dispatcher, Hall's is liable to each passed over driver for the compensation he/she would have earned on the run. The issue is determined through a mechanism called a "run-around grievance."

10. When drivers are called, they are given a choice from whatever dispatches are currently available, but they must pick from what is available at the time they are called. They may not pick or pass, i.e., wait for a more favorable dispatch. (GX-9, 10, 11).

11. Because of the nature of the business, the readiness of loads for dispatch is unpredictable, so that drivers may be called at any time night or day (Tr. 25A, 480) with certain limited exceptions (Tr. 535).

12. Hall's maintains a number of records at its West Middlesex terminal to keep careful account of the availability of drivers for loads, including a line driver register card (also referred to as a log audit card) maintained at the dispatcher's desk (Tr. 29A, 579, 706, 738, 760, GX-30A).

13. Telephone calls from the dispatcher to a number furnished by the driver which result in no answer, busy signal, or driver not at home are the equivalent of absences and will be noted on the line driver register card (Tr. 81A, 222, 483, 514, 707-709).

14. There is no contention that runs are scheduled at such distances as could not be completed in less than 10 hours normal driving time. Drivers are required to book-off for 10 hours following the completion of a run during which time they are not eligible for work calls (Tr. 29dA, 324, 373).

15. Hall's reviews the absentee record of drivers periodically and based on the overall record, issues warning letters or takes disciplinary action against drivers. (TR 591-2, GX-19A through P, GX-20 A through P, GX-21A). The disciplinary action can range from suspension for one day to one week (GX-24A, D, E, G, I) to discharge (GX-24B and H) for chronic and habitual absenteeism (Tr. 22A, 203), which is a dischargeable offense under the union agreement (HX 39).

16. Plaintiff Lowry was discharged in December, 1979 (Tr. 202), at which time he was the first driver ever discharged by Hall's or its predecessor for absenteeism

(HX 39Z-5), and Plaintiff Gaibis was discharged on May 6, 1980 (Tr. 22A). No evidence of subsequent discharges for absenteeism appear in the record.

17. Only about one-third of the drivers at West Middlesex were issued warning letters or disciplined from November of 1974 through the date of the hearing (Tr. 597), and driver Caccia missed more work calls than any driver and still had not been discharged (Tr. 559).

18. Regarding availability for dispatch, drivers at West Middlesex in on-call status may provide the dispatcher with a number at which they can normally be reached (generally at home) (GX-9, 10, 11); or provide an alternate number where they may be reached when not at home; (Tr. 586, 706, 733, 829), or may stay in touch by calling the company (Tr. 586, 542, 547, 807); or by staying in touch with someone at home to find out if the company has called (Tr. 793); or by instructing someone at home to ask for and accept a dispatch when the company calls (Tr. 817, 830, 587, 612). This latter situation does not occur frequently because its availability is not widely known (GX-3, Tr. 91, 214, 345, 383, 417, 546, 796); nor encouraged by the company (GX-3, Tr. 179, 587-589, 648, 711, 724, 727); nor attractive to drivers because it would require them to report within two hours of the time the dispatch is received by the person answering Hall's call (Recommended Decision, pp. 20-21).

19. It is Hall's policy to book a driver off when it is brought to the company's attention that the driver is sick or fatigued at the time of dispatch (Tr. 598, 624, 737, 739), but Hall's discourages last minute book-offs (GX-9, 10, 11), and such book-offs are recorded as unavailability and considered in evaluating drivers' overall absentee record (Tr. 625), and may contribute to his being warned or disciplined (GX-21A).

20. No driver was able to testify that, although he was frequently fatigued at the time of dispatch, this condition was brought to the attention of Hall's (Tr. 110,

248, 349, 395, 452, 550), or that a dispatcher ever refused to book a driver off who complained of fatigue (Tr. 83, GX-21E, Findings of Fact No. 19).

IV. Answers to Propounded Questions

a. Time spent on general stand-by for a work call need not be logged as "on-duty" unless the requirements imposed by the employer are such that actively and unreasonably interfere with a driver's ability to rest. Since the regulations are principally concerned with accounting for "on-duty" time so as to prevent exceeding the limits, violations are only likely to occur when "on-duty" time is logged as "off-duty," and not vice versa.

b. Generally, such time may be logged as "off-duty" consistent with the safety regulations. The imposition of discipline for failing to respond to work calls is largely irrelevant unless it would directly interfere with the driver's ability to use the "off-duty" time to rest.

c. The logging procedure supports the hours of service limitation. If a driver logs time "on-duty not driving" when it would be permissible under the regulations to log such time "off duty," the maximum hours allowed to him in a particular time frame would be restricted beyond the intent of the rules, but would not necessarily equate to noncompliance with the regulations.

d. The arrangements between the company and its drivers concerning the use of off-duty time is only relevant to the regulations to the extent that the control exercised by the company alters the status of the drivers' time so that the ability of the drivers to use this time to get the needed rest is impaired. Consequently, holding a driver accountable for not meeting his/her obligation under the agreement could not *per se* be a violation of the FMCSR, nor could the requirement that the time available to the driver for rest and relaxation be logged as "off-duty."

e. It is normal and appropriate to log the time available for dispatch as "off-duty," and the circumstances in the case of Hall's and its predecessor do not alter that conclusion.

f. The dispatch and logging procedure employed by Hall's and its predecessor is designed, at least in part, to assure against violation of the maximum hours of service provisions of Part 395. The practices employed by the company in implementing the procedure do not, by their nature, frustrate the intent of the rule and consequently are not violations of the FMCSR.

V. Arguments

It is the contention of Gaibis and Lowry (the complaining drivers) that the FMCSR are violated in two principal ways as a direct result of Hall's logging and dispatching procedures.

First, it is contended that requiring drivers to log time spent eligible and waiting for a dispatch as "off-duty" is inconsistent with the definition of "on-duty time" in 49 CFR 395.2, and consequently misrepresents the actual hours of service performed by drivers. If this time were to be logged as "On-duty, not driving," drivers would routinely be exceeding the maximum hours of service permitted under 49 CFR 395.3. Moreover, although this is not a part of the drivers' contention, requiring drivers to log "on-duty" time as "off-duty" is tantamount to falsifying logs in violation of 49 CFR 395.8.

Next, Gaibis and Lowry contend that by requiring drivers to be available at all times while they are eligible for dispatch results very often in their being dispatched in a fatigued condition in violation of Section 392.3 of the FMCSR.

a. Section 395.2(a)

Regarding the first contention of Gaibis and Lowry, much depends on the meaning of "on-duty time" as used

in the FMCSR and accounted for on the driver's daily logs. The record is replete with correspondence between FHWA and several drivers, including Messrs. Gaibis and Lowry, beween FHWA and Hall's and between FHWA and members of Congress concerning this issue. (TX-1, TX-2, TX-3, TX-4d, TX-4e, TX-6(h), TX-7, TX-9, TX-10, TX-11, TX-14, TX-18, TX-19, TX-20, TX-21, TX-22, TX-25, TX-26, TX-32, TX-35, HX-5, HX-6, HX-7, HX-8, HX-13, HX-14, HX-15, HX-16, HX-18, HX-19, HX-20, HX-21, HX-22, HX-23, HX-24, HX-25, HX-28, HX-29, HX-30, HX-31, HX-32, HX-35, GX-2, GX-13, GX-14, GX-15, GX-16, GX-17, GX-18).

"On-duty time" is defined in the FMSCR, at §395.2 as: "All time from the time a driver begins to work or is required to be in readiness to work until the time he is relieved from work and all responsibility for performing work." The section goes on to enumerate nine instances of on-duty time, none of which could remotely be interpreted to include time spent at home waiting for a dispatch call. However, the nine categories are not intended to be all inclusive, and it is contended that the words ". . . is required to be in readiness to work . . .," sufficiently encompass that situation.

An official interpretation, published in the *Federal Register* on November 23, 1977 (42 FR 60078, at 60085), was intended to clarify the language of the regulation, as follows:

> "The purpose of (Sec. 395.2a) is to allow the driver opportunity to obtain adequate rest. This means that he must be relieved of all responsibility from work and be free to use the time effectively for his own purposes during that specified period of time.
>
> When a driver is required by a motor carrier to personally stand by to receive a telephone notice to report for work, following a required off-duty period,

> and the driver does in fact stand by, he meets the requirements of §395.2(a) and such time must be logged as on-duty time."

As the Administrative Law Judge observed, the weight generally afforded the official interpretations of an agency dissipates when the interpretations themselves are ambiguous. (Recommended Decision of A.L.J. at 32.). Subsequent communications from officials in the agency have elaborated on the interpretation to some extent by construing it to mean that if some alternative method of providing notice to drivers is available, there is no requirement "to personally stand by." By letter of July 13, 1979 (HX-31), Federal Highway Administrator Karl S. Bowers observed as follows:

> "Under the provisions of the FMCSR, a driver is "on-duty" when he is working, or required to be in readiness to work. A driver is considered to be *"on-duty"* if he is required to remain at a particular location to *personally* receive notification or instructions. *A driver is not considered to be "on-duty" if a third party may take a message for him, or if he is free to move around, but must keep the carrier notified as to where he can be reached."* (Emphasis in original).

In spite of the use of the alternative conjunction, "or," the Director argues that other communications (HX-22, for example) use the inclusive conjuction "and", which is more consistent with the official interpretation. Consequently, the Director believes the burden is on Hall's to prove that it provides all practical alternatives to personal availability, including "a viable third-party dispatch system," in order to remove the time drivers spend eligible and waiting for a dispatch from the definition of "on-duty time." (Director's Petition for Review and Brief, pp. 4-5)

Gaibis and Lowry, of course, would go even further. Their position is that any restriction imposed by the company on their freedom to use their time effectively for

their own purposes would require the logging of such time as on-duty. (Reply Memorandum of Plaintiffs Gaibis, Lowry *et al.*, p.2)

Much of the testimony at the hearing concerned the company's dispatch procedures, and whether alternatives to personal availability were provided. One such alternative, a "third-party dispatch system" received particular attention. Whence the term originated is not disclosed in the record, nor is its meaning, although it seems at times to be picked up as a term of art, particularly by the attorney for the Director. Of course, there is no requirement in the FMCSR, or anywhere else for that matter, that an interstate motor carrier must have a "third party dispatch system." Neither the official interpretation nor any of the correspondence between the FHWA and interested parties employ the term. Indeed, there is some disagreement as to its meaning. At least one dispatcher, Mrs. Eversole, indicated that to her, any message left with a third person at the number at which a driver was supposed to be available, was the equivalent of a third party dispatch (Tr. 752-3). In fact, much of the confusion surrounding the alleged "third party dispatch system" at Hall's could be attributed to the fact that it had never been referred to as such, in addition to the unwillingness of drivers to accept such a system coupled with a two-hour reporting requirement. (Findings of Fact, No. 18)

In short, I find that there is no such requirement implicit in the regulations or in any formal or informal interpretations of them. The statutory responsibilities transferred from the Interstate Commerce Commission to the Department of Transportation in 1967 (49 USC 1655 (e) and (f)) involved the safety of persons and property in interstate commerce. The whole purpose of the regulations is to promote the safe operation of motor vehicles in interstate commerce. The intent of Part 395 of the FMCSR is to assure that interstate commercial vehicle operators are sufficiently rested to prevent harm to

both of them, the property entrusted to their care, and the person and property of other users of the highway. Any attempt to regulate beyond that which is directly related to a safety concern, or to interpret a regulation beyond its effect of safety is without statutory authority and of no practical effect.

In *United States et al. v. American Trucking Associations, Inc. et al.*, 310 U.S. 534 (1940), that very issue was central to the Court's construction of Sec. 204(a) of the Interstate Commerce Act (ICA), the legislative authority for Part 395 of the FMCSR. The American Trucking Associations (ATA), on behalf of carrier members apparently wishing to escape to the extent possible the requirements of the newly enacted Fair Labor Standards Act (FLSA), petitioned the Interstate Commerce Commission to exercise its jurisdiction under §204(a) of the ICA to fix reasonable requirements with respect to the qualifications and maximum hours of service of all employees of common and contract carriers. 310 U.S. 534, at 541. Any employee with respect to whom the Commission had power to regulate qualifications and maximum hours of service under §204(a) was exempted from the provisions of the FLSA. The Commission had reached the conclusion, which it reaffirmed in response to the ATA petition, that its power under §204 was limited to prescribing qualifications and maximum hours of service for those employees "whose activities affect the safety of operation." *Ibid.* at 540. The Court, after considering a fair reading of the statutory language, the legislative history, and contemporaneous interpretations by the Commission held that the entire purpose of Congress in empowering the Commission with such discretionary power was "to promote careful operation for safety on the highway," and concluded:

> "Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in §204(a)(1) and (2) is limited to those employees

whose activities affect the safety of operation. *The Commission has no jurisdiction to regulate the qualifications or hours of service of any others.*" Ibid., at 553 (Emphasis Added)

Hall's argues persuasively that an agency must follow its own regulations, including both formal and informal interpretations of those regulations, and that such interpretations of an agency are to be afforded great weight. (Post-Hearing Brief of Hall's, pp. 24-28) The problem, though, is in interpreting the interpretations. Hall's believes they stand for the proposition that the requirement to stand by personally must be directly communicated by the company or else there is no such requirement. I have already noted the beliefs of Gaibis and Lowry, and that of the Director, both of which differ from each other and from that of Halls's.

It is important to note that none of the interpretations in the record are contemporaneous with the regulation itself, and the official interpretation was issued some 40 years after the regulation. It is worthwhile then to examine whether the interpretations are consistent with the purpose of the authorizing legislation.

As noted in the official interpretation of 395.2, "(t)he purpose of this rule is to allow the driver opportunity to obtain adequate rest." That purpose is entirely within the responsibility of the agency to carry out the safety aspects of the Interstate Commerce Act, transferred by the DOT Act, and specifically Sec. 204 thereof authorizing the regulation of "qualifications and maximum hours of service of (drivers)." (Compare *U.S. v.ATA*, supra.) This is accomplished by directing that any time during which the drivers's ability to obtain rest is impaired by requirements imposed by the employing carrier be accounted for as on-duty time. Thus, when the instructions of the employer direct the driver to stand by at a given location in order to perform some service to the employer which is currently within the conscious contemplation of both

parties, and which would frustrate or prevent the driver from obtaining rest, the time spent standing by must ordinarily be logged as on-duty time. Where, however, there is a general requirement of driver availability for call after a mandatory rest period which complies with the regulatory limits, there is no requirement that time spent being available in the event work materializes be logged as on-duty time. This is particularly so when the drivers through their collective bargaining representatives have agreed to the availability by telephone which is the long-standing practice for employment of over-the-road drivers (HX-44C, Findings of Fact, No. 3, 5 and 7).

There is no question that in some cases, the demands placed upon a driver by an employing carrier during time logged as "off-duty" are such that prevent that driver from obtaining sufficient rest. It is a common practice in the trucking industry for drivers to deliver a load, call the dispatcher, and be told to stand by in anticipation of another load materializing. Whether that stand-by time is compensated depends on the arrangement between the employer and employee. But regardless of compensation, the time must be logged as "on-duty, not driving" and be credited against the driver's hours of service in a given time period limited by Part 395 of the FMCSR.

That situation is far from the case here. Under Hall's dispatching system, and it is undisputed in the evidence presented by all parties, when a run is completed at the home terminal, the driver goes off duty for a minimum of ten hours. (Findings of Fact, No. 5 and 14) Thereafter, the driver continues in an "off-duty" status until he is called by the company and notified to report to work. Within two hours after the call, he must be at the terminal in readiness to work, at which time he is properly logged as "on-duty." (Findings of Fact, No. 5)

Gaibis and Lowry seize upon the language of several of the interpretations of §395.2 to support their position, i.e., "free to use the time effectively for his own purposes." (HX-16E, for example) Therefore, because of the

need to be available for a telephone notification, the driver's freedom is restricted to the point tha they cannot play golf, for instance, (TR. 661), or attend a movie (TR-662), or go to a picnic (TR-338), or operate a farm (TR 339). None of these activities is particularly conducive to rest, and whether a driver is "free" to pursue them is really of ... legitimate interest to the Department of Transportation."On-duty" for purposes of the FMCSR is not the same as "on-duty" for purposes of compensation, or a labor agreement, or any other bone of contention that may arise between employer and employee. To attribute such an interpretation to the rule would be conceding an authority to the rulemakers that they simply do not possess.

Unfortunately, the language of some of the interpretations could easily be understood to mean that "off-duty" time must be totally unrestricted. To the extent that such a regulation would exceed that which is required to accomplish a safety purpose, however, it would be beyond the scope of the authority of the DOT. Regulations must be interpreted in such a way that accomplishes the lawful purpose for which they are promulgated.

Assume, arguendo, that the drivers are correct, and 395.2 would require that all time spent on call after the tenth hour following the "statutory" rest period be logged as"on-duty" time. Under §395.3, *Maximum driving and on-duty time*, very few drivers would ever have sufficient hours available to accept a run. The absurdity of this conclusion is apparent from the drivers' own testimony. They could be on call anywhere from eight to fifty-four hours (Tr. 26, 344, 378) before receiving a call. All that time would have to be logged as "on-duty, not driving." Coupled with the ten-hour rest period (an expansion of the FMCSR requirement of eight hours), the contract requirement of a two-hour reporting time, the union sanctioned requirement that a driver have 22 available hours left at the time of dispatch, and considering the FMCSR

limitations of 15 hours in a 24 hour period, and 70 hours in an 8-day period, when would the drivers be permitted to drive? and how often? Of course, it could be argued that the system should be changed, and indeed maybe it should, but that is between the employer and the union, and not a matter to be resolved through interpretations of safety regulations.

Freedom to rest is the overriding consideration, and the safety purpose which empowers DOT to regulate the maximum hours of service. Consequently, the time that a driver is free from obligations to the employer so as to be able to use that time to secure appropriate rest is properly logged as "off-duty" consistent with Sec. 395.2. The fact that the driver must also be available to be called in the event he is needed at work, even under the threat of discipline for non-availability, does not by itself impair the ability of the driver to use this time for rest.

b. Unpredictability of Calls

The drivers further contend that the unpredictability of work calls coupled with the absence of alternatives to personal availability so restricts their movements that they are tied to the telephone and consequently more in service to the company than free to engage in activities of their own choosing. For the reasons stated in the discussion of §395.2, above, the regulations do not contemplate a complete absence of restriction on movement.

There are a number of factors contributing to the unpredictability of work calls. Most obvious is the fact that the loads ready for shipment are unpredictable and it is in Hall's interest to expedite the shipment as soon as it is ready in order to remain competitive in the industry. (Finding of Fact, No. 4). That this is also in the employees' interest is recognized by the union and is noted in the National Master Freight Agreement, Article 20, which has been interpreted during grievance and arbitration proceedings to mean that employees have an ob-

ligation to make themselves available for work at the time prescribed by the company (HX-44C). The "hog seniority system" has also been cited as contributing to the unpredictability of loads (Findings of Fact, No. 6; Post-Trial Brief of Plaintiffs, p. 4; Recommended Decision, p. 10). Certainly, the requirements imposed by this system do not inure to the benefit of the company. In fact, the whole telephone dispatch system can be said to have evolved in response to the FMCSR and the work rules negotiated by the union. (Findings of Fact, No. 5) Consequently, calls must be made in strict seniority order or the company will be liable to pay a driver it failed to call (Findings of Fact, No. 9), drivers are guaranteed a minimum wage, and contributions to unemployment insurance and health and welfare benefits regardless of the amount of work performed (Findings of Fact, No. 7, 8). In return, the drivers agree to be available, and if they are not, they can be disciplined, or suffer loss of benefits. (HX 39-2-1, HX-43I, HX-44C, interpreting the relative obligations under the contract of employment). The company gets little benefit from the strict rules of the telephone dispatch system, and, in fact, Hall's would not care who responded to a work call so long as somebody did. (TR. 601)

From all the testimony offered at the hearing, working conditions at the West Middlesex terminal have been less than ideal. The company mistrusts some drivers, some drivers mistrust the company. The work rules are examples of this mistrust, requiring a union steward to verify unanswered or busy calls, (GX-9, 10 and 11), and in the gradually increasing instances of warning letters and disciplinary actions. This is an unfortunate situation and detracts from a smooth running operation that would also enhance safety.

There is, however, evidence that work is not so unpredictable as some drivers (Gaibis, Lowry, Northcott, Logsdon) perceive. Three drivers were called to testify by the company, and presumably have no stake in the out-

come of the proceeding. Driver Bell testified that because of his seniority position (one behind Gaibis), he generally runs out of available hours in five days (Tr. 800, 801, 810) and some times in four days (Tr. 804) so that he stays pretty close to home during that time. He also testified that he is able to get some idea as to when he may be called by calling the dispatcher (Tr. 806, 7). Both Bell and driver Mennor received dispatches regularly through third parties (Tr. 794, 217), and driver Gustafson not only receives dispatches through a third party on occasion (Tr. 830), but testified: "The longer you have been there (Hall's), you have a pretty good idea when you're going to be called." There was also evidence that driver Caccia was able to manipulate the system to get his work in betwen Monday and Thursday (Tr. 699), and further, that dispatchers are instructed to be as cooperative as possible with drivers who call for information about dispatches (Tr. 690), and that information must be obtained through these calls is evident from the fact that virtually all drivers testified that they frequently call the dispatchers. The business agent for the union found that Hall's policy concerning absenteeism was more liberal than at another company (Tr. 480, 486), and in spite of all the testimony of rigid discipline concerning absenteeism, only two drivers, Gaibis and Lowry, have ever been discharged for that cause (Findings of Fact No. 16), and only about one-third of the drivers at West Middlesex received so much as a warning letter (Findings of Fact No. 17).

c. Sec. 392.3

Although Hall's logging and dispatch procedures do not wrongfully require drivers to log "on-duty time" as "off-duty" so as to violate or necessarily bring about violations of §§395.3 and 395.8, it is contended, and indeed the ALJ found, that the procedures are so onerous as to cause drivers to be dispatched in a fatigued condi-

tion in violation of §392.3. That section reads, in pertinent part, as follows:

> "No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue operate the motor vehicle."

No case has been brought to my attention, nor am I aware of any, where a carrier has been prosecuted under this section on the theory that the dispatching procedures cause drivers to be dispatched in a fatigued condition without some evidence that it actually happened at a specific time and place with the knowledge of the carrier.

The history of the rule, which dates back to 1936 when the original FMCSRs were issued, is not very helpful in determining its specific purpose, except that it was intended "to protect against the hazard of a driver whose ability or alertness is impaired through fatigue, illness or other cause." 1M.C.C.1(1936) It is, however, prosecutable only in a criminal proceeding under 49 USC 11914(b), (see also 49 USC 322(a)) as it does not involve recordkeeping. Thus, successful prosecution would require proof beyond a reasonable doubt that Hall's knowingly and willfully violated the regulation. Since we are dealing with issues more in a theoretical vein than an actual set of circumstances in which a carrier is alleged to have dispatched a driver in a fatigued condition, not only are the terms "knowingly" and "willfully" difficult to apply, but the quantum of proof "beyond a reasonable doubt" is very nearly impossible.

While many of the drivers testified that they had frequently been dispatched in a fatigued condition, none could state that they had actually brought the condition of fatigue to the attention of the dispatcher before ac-

cepting a run. (Findings of Fact, No. 20) Fatigue is a very subjective state of being, which is not, in the general sense, easily verifiable through objective observation. The FMCSR attempt to control the very dangerous problem of driver fatigue through restrictions on the number of hours drivers are permitted to operate in a given time period. This affords an objective measurement of the ratio of time worked and time off. The regulations create an obligation on both the employing carrier and the drivers to abide by the restrictions, and it is safe to say that enforcement of the obligations on the part of BMCS is, in the overwhelming majority of cases, carried out through inspections and audits of the driver's daily logs.

If Hall's procedures did in fact cause drivers to be dispatched in a fatigued condition, it must have been done with the knowledge of Hall's, and continued after such knowledge was acquired in willful disregard of its consequences in order for Hall's to be in violation of the regulations and, consequently, the underlying statute. The standards for determining whether an act is "knowing" or "willful" were set down by the U.S. Supreme Court in *United States v. Illinois Central R. R. Co.*, 303 U.S. 239. (See also *U.S. v. Paramount Moving and Storage Co.*, 479 F. Supp. 959, D. Fla. 1979) After establishing that there is a distinction between "knowingly" and "willfully," the Court went on to say: "So giving effect to these considerations, we are persuaded that it (i.e. "willfully") means purposefully or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." *Ibid*, at 242-243.

There is no dispute that Hall's knew about the requirements in the regulations, and if any of its agents (e.g. dispatchers, terminal managers, Director of Industrial Relations) knew that drivers were being dispatched in a fatigued condition, that knowledge would be imputed to Hall's. *Steere Tank Lines, Inc. v. United States*,

330 F. 2d 719 (5th Cir. 1963); *Riss & Co. v. United States*, 262 F. 2d 245 (8th Cir. 1958); *United States v. Sawyer Transport, Inc.*, 337 F. Supp. 29 (D. Minn. 1971).

In *United States v. T.I.M.E.—D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974), a carrier was prosecuted under Sec. 392.3 for two alleged instances of dispatching drivers in ill condition. In a situation similar to the one here, the company had been experiencing increased absenteeism at one of its terminals. To combat the condition, the company initiated a policy whereby a driver calling in to be booked off as sick would be charged with an unexcused absence unless he later produced a doctor's slip. Subsequently, one driver called in complaining of a back injury and was informed by the dispatcher that he would be booked off, but would be charged with an unexcused absence. Within an hour, the driver changed his mind, notified the dispatcher of his availability, and later reported to work, accepted a dispatch and completed it without reported problems.

A second incident occurred about a month and a half later when a driver called to be marked off because of an ear problem. Three hours after being informed of the company policy, he called back and requested to be placed back in the lineup and was dispatched later that evening. After traveling about 110 miles, the driver became nauseous, telephoned the company for relief, and was treated at a hospital for an inner ear infection. There was conflicting evidence as to whether either driver had in fact been made aware of the opportunity to have the unexcused absence later changed to excused upon submission of medical verification.

The Court found the company not guilty with respect to the first violation, and guilty with respect to the second. The rationale for distinguishing between the two incidents was based on the level of knowledge and willfulness on the part of the company, attributable to each. In the time frame between the two incidents, there was apparently much confusion and discontent relative to the

coercive effect of the policy which eventually matured into a grievance. Whereas the company could not have been chargeable with knowledge of the likely effects of its policy in the earlier incident, it had notice sufficient to cause it to examine its policy more closely by the time the second occurred. The "willfulness" requirement for conviction was found in the company's conscious disregard for its affirmative obligation "not to 'require or permit' drivers to operate their vehicles while impaired." By leaving adherence to the regulation almost entirely the responsibility of its drivers, the Court concluded that the company beyond a reasonable doubt had willfully disregarded its duty under §392.3.

While there are many similarities between the *T.I.M.E. — D.C.* case and the instant proceeding, there are also several important distinctions. In *T.I.M.E. — D.C.*, there were specific instances where particular drivers were dispatched after notice of possible health problems, and there was verifiable medical evidence that the second driver was indeed dispatched in a condition where his illness was such that made his "ability or alertness (to be) so impaired, or so likely to become impaired as to make it unsafe for him to begin or continue to operate the motor vehicle." (49 CFR 392.3) In this case, there are the driver's subjective and self-serving claims that they were routinely in a fatigued condition when dispatched, yet in each instance that a driver claimed he was fatigued at the time of dispatch, he also denied that he had informed Hall's of his condition.

On this issue, the testimony of the drivers is very interesting. On cross-examination, Mr. Gaibis, the plaintiff in the principal lawsuit who had been fired by the company for chronic absenteeism, and who had been conducting a campaign of letter-writing to the company and to the BMCS on many aspects of the work rules since 1972 (GX, HX, and TX), testified as follows (Tr. 100-111):

"(Mr. Milone): Now, Mr. Gaibis, you have never been forced to drive a truck by Hall's in a fatigued condition; have you?

"(Mr. Gaibis): Well, that's—I would say the end of the disciplinary action applied to under work rules, yes, and the method it was dispatched.

"Q. Was there ever an occasion where you received a dispatch call and told the dispatcher you were too fatigued or too tired to drive and you were forced to take that call?

"A. Not that I can remember.

"Q. What is Hall's policy concerning dispatching fatigued drivers?

"A. The only thing I can refer to is the work rules, and drivers may not report off at the time of call.

"Q. My question is, what is Hall's policy with respect to dispatching fatigued or tired drivers; do you know?

"A. There's nothing in the work rules that has anything.

"Q. You don't know what it is; do you?

"A. As far as the work policy is—rules are concerned, no.

"Q. You never inquired to anyone at Hall's what the company's policy for dispatching tired drivers was?

"A. No.

"Q. You never asked whether you were permitted to turn down a dispatch call because you were too tired or too fatigued to drive; did you?

"A. Personally?

"Q. Yes.

"A. Like I say, I don't think. I don't think I ever called in—

"Q. My question is, did you ever ask anyone what the policy was with respect to the driver being permitted to turn down a dispatch call because he was too tired or too fatigued to drive; did you ever ask anyone at Hall's what that policy was?

"A. No.

"Q. Yet, by your own testimony, you drove in a fatigued condition quite frequently?

"A. Yes.

"Q. Almost all the time? Almost every time you went out you considered yourself too fatigued to drive; didn't you?

"A. I think I said mostly every time.

"Q. Mostly every time. Yet, you went out; correct?

"A. Yes.

"Q. And yet, you did not tell the dispatcher you're too fatigued?

"A. No, I didn't.

In addition to bringing Mr. Gaibis' credibility into serious question, that testimony sheds some light on the perception of the fatigue problem, the knowledge to be attributed to the company, and the relative responsibility of the company and the drivers. While *T.I.M.E. — D.C.* intimated that constructive knowledge on the part of the company could not leave responsibility for adherence entirely to the drivers, we must assume from the wording of the regulation that there is a shared responsibility. Compare the testimony of driver Bell, whose role can be fairly described as disinterested (Tr. 796):

"(Mr. Tierney): Kr. Bell, have you ever been dispatched in a fatigued condition?

"(Mr. Bell): Yes, I have.

"Q. Have you brought this condition to the attention of the dispatcher?

"A. I have at times, depending on how I felt. If I felt as though I could go out and sleep on the road an hour or two, I generally would go ahead and do it. If I feel as though I cannot do it, I would tell the dispatcher, which has happened at times, and he'll tell me to call back when you are ready.

"Q. Have you ever been disciplined for booking off at the time of dispatch call?

"A. I imagine my card might have been marked, but I have never been disciplined; no."

With respect to this issue and as an indication of the motive of the drivers, compare the testimony of Mr. Mennor, another relatively disinterested driver (Tr. 818-819).

"(Mr. Tierney): Have you ever been dispatched in a fatigued condition?

"(Mr. Mennor): Yes.

"Q. When you were dispatched in a fatigued condition, did you call it to the attention of anyone at Hall's?

"A. No. I figured I would start and drive a few hours and catch an hour sleep or something and finish the trip.

"Q. Is it permitted in your experience by Hall's work rules?

"A. No, it ain't permitted.

"Q. Did you receive any disciplinary action as a result of doing that?

"A. No, and never had any.

"Q. Never had any disciplinary action?

"A. No.

"Q. Why did you (not) tell the dispatcher that you were fatigued at the time you accepted the dispatch?

"A. Well, I wanted to make the trip."

and another driver, Mr. Gustafson (Tr. 832-833):

"(Mr. Tierney): Have you ever been dispatched in a fatigued condition?

"(Mr. Gustafson): Yes, I have.

"Q. Did you bring it to the attention of anyone at Hall's or Werner Continental?

"A. No, because I wasn't that fatigued that I couldn't handle it. I mean, I knew—I knew that I was tired but I wasn't wiped out fatigued that I would be a danger on the highway.

"Q. So you weren't so tired that you felt that it was unsafe for you to drive?

"A. No; otherwise, I would have refused the call.

"Q. Have you ever (refused) a call for being fatigued

"A. Yes, I have.

"Q. How did you go about doing that?

"A. I generally knew—you have—there again, it's a matter of experience. The longer you have been there, you have a pretty good idea when you're going to be called. I knew if I hadn't had proper rest prior to my work call, I would have called the dispatch and booked off.

"Q. Have you ever received any discipline for doing that?

"A. No.

It seems clear from the drivers testimony that the prime motive for accepting a dispatch, even in a "fatigued" condition, is to earn money. And it is equally clear that if they notified the dispatcher at the time of dispatch that they were fatigued, they would not be assigned the run. The regulations prohibit the drivers from operating a motor vehicle while in an impaired condition which creates an affirmative duty on their part to decline to drive, or at the very least, to call the attention of the employer to their fatigued condition. By their own admissions, the drivers have on many occasions failed in their obligation. But, as was true in *T.I.M.E. — D.C.*, the employing carrier is not relieved of its obligation to refuse to permit a driver to operate a vehicle while his condition is impaired due to fatigue when it reasonably should have knowledge of such condition. To be sure, Hall's has been aware for many years of the dissatisfaction of several of its drivers with the dispatch system, and their complaints that the system creates a safety problem. Is this sufficient notice to the carrier in the event a driver is dispatched "while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle"? I think not.

Without actual notice, some other "means to know" must have been available to the company in order to create criminal liability. *T.I.M.E. — D.C., supra*, p. 739 (citing *Steere Tank Lines, supra; Riss & Co., supra;* and *U.S. v. Sawyer, supra.*) The Court, in *T.I.M.E. — D.C.*, relied upon the recentness of the change in company policy, the drivers' complaints that the policy was likely to have a significant effect upon a driver's decision to mark-off, and the actual notice of driver Brown that he was too ill to drive to draw the conclusion that the company had the "means to know" by adopting a more realistic approach to its no mark-off rule. *Ibid,* p. 740.

Hall's, on the other hand, has had the procedures complained of in place for many years, has twice undergone investigations by BMCS which found no violations of the regulations, had no actual notice of fatigue from a single driver it subsequently dispatched, and had a policy which required book-off upon information that a driver was too fatigued. Its no book-off at the time of dispatch rule certainly did not invite notice of fatigue, but its policy afforded ample opportunity for a driver to decline to accept a dispatch in a fatigued condition.

There is no evidence that safety problems existed which would have indicated to Hall's that drivers were operating in a fatigued condition. One driver, Logsdon, testified that he had had a minor accident as the result of falling asleep while driving (Tr-341), but he did not say that Hall's was made aware of the accident, and, in fact, intimated that he made the repair himself without telling Hall's. There is, however, no evidence that Hall's was experiencing an abnormal number of accidents that would have alerted it to a problem. BMCS records indicate that the accident rate of Hall's is well below the national average for carriers of similar size. Data available in the BCMS Management Information System indicate that in 1979, Hall's experienced 0.425 accidents per million miles travelled. The average for common carriers with a fleet size similar to Hall's is 0.934 accidents per million miles, and for all common carriers is 1.406 accidents per million miles.

Finally, in my Notice of Review, I requested the Director to furnish information concerning the enforcement experience with Sec. 392.3. Part of this information was furnished in the Director's Petition for Review and Brief, pp. 6-13. I have subsequently been informed that BMCS records of enforcement cases by regulations section violated is automated only since April, 1981, and that since that time, in over 29,000 violations cited, none have been for violation of 392.3. Other than the *T.I.M.E. —D.C.* case, no cases have been brought to my attention,

nor am I aware of any, that have been brought under 392.3. This is not surprising. BMCS enforcement cases require a high degree of documentation, and even in the *T.I.M.E. —D.C.* case, it is extremely doubtful whether the charge could have been sustained without proof of the ill condition of the driver dispatched. Proof of a fatigued condition has never, to my knowledge, been tested, although it is conceivable that under the right circumstances such a condition could be demonstrated. Consequently, I would not conclude that the rule as applied to fatigued drivers is of no effect.

As the Director observes:

> "The problem of driver fatigue is a recurring one in the trucking industry. The Bureau of Motor Carrier Safety deals with the problem primarily through its hours of service regulations. Those regulations are designed to ensure the driver is given sufficient time off from work to obtain adequate rest. The regulation cannot, and should not, regulate the driver's activity during that off-duty period. On the other hand, the hours of service regulations cannot operate in a vacuum. Real life situations must be recognized and supplemental measures provided in a further attempt to eliminate unsafe operations. One of the supplemental measures is the regulation prohibiting the dispatching of ill or fatigued drivers."

Petition for Review and Brief, p. 11-12.

I do conclude, however, that there has been insufficient evidence produced in this case to sustain a charge that Hall's knowingly and wilfully dispatched drivers in impaired condition due to fatigue, or that its dispatching procedures were such that caused drivers to be dispatched in such condition with the knowledge of Hall's, and that Hall's disregarded the consequences of its procedures, which it should have known, in violation of Sec. 392.3 of the FMCSR.

The changes to its dispatch procedures adopted by Hall's in its notice of January 18, 1981 (GX-11) should provide more opportunity for drivers to book-off without threat of discipline and should improve the working conditions. However, so long as the industry continues to structure its operating practices on such keen competition as requires so high a degree of availability on the part of its drivers, a problem will remain.

VI. Conclusions

1. Hall's dispatching procedures do not violate Part 395 of the FMCSR.

2. Hall's procedures do not require drivers to log time as off-duty that should rightfully be logged as on-duty.

3. The FMCSR do not preclude a carrier from requiring its drivers to be available for work calls during off-duty hours so long as the ability of the drivers to obtain rest is not unreasonably impaired.

4. Hall's dispatch system allows sufficient flexibility so that drivers are able to control their free time in order to obtain adequate rest, and to refrain from accepting work calls in a fatigued condition.

5. Hall's does not dispatch drivers who are fatigued if such condition is known at the time of dispatch.

6. Hall's dispatch procedures and disciplinary system are not so onerous that drivers are necessarily required to accept work calls in a fatigued condition.

7. The FMCSR are an inappropriate vehicle for resolving disputes between employers and employees concerning the relative obligations of each, except to the extent that practices violate or threaten violation of the safety requirements in those regulations.

Lorenzo Casanova
Associate Administrator for Safety

Dated: March 29, 1982

CERTIFICATE OF SERVICE

This is to certify that on this 29th day of March, 1982, copies of the foregoing Decision and Order has been sent to the following:

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A-34

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Department of Transportation
Washington, D.C. 20590

Dated: March 29, 1982

Judith A. Morrin
Secretary

BEFORE THE
FEDERAL HIGHWAY ADMINISTRATION

In the Matter of	:	Docket No. 81-65C
GAIBIS & WERNER CONTINENTAL (HALL'S MOTOR TRANSIT COMPANY)	:	

DECISION ON PETITION FOR RECONSIDERATION

Messrs. Gaibis and Lowery (hereinafter "Plaintiffs") filed a Petition for Reconsideration of the Final Decision of former Associate Administrator Lorenzo Casanova in the captioned matter. Hall's Motor Transit Company (formerly Werner Continental, and hereinafter "Hall's") opposed the Petition, while the Director, Bureau of Motor Carrier Safety, took no position with respect to it. The Plaintiffs' Petition alleges no new facts or developments which were not available in the record on which Mr. Casanova's decision was based, and the argument that the procedures followed in complying with the District Court's Order were defective is not persuasive. The Petition is accordingly denied.

Plaintiffs assertion that the Federal District Court Judge did not suggest any procedural guidelines is patently erroneous. The remand Order of Judge Simmons of the United States District Court for the Western District of Pennsylvania certified a question to the Bureau of Motor Carrier Safety in the Federal Highway Administration "for investigation and resolution in accordance with its rules of Practice and procedure." The Rules of Practice for Motor Carrier Safety Proceedings are promulgated in Part 386 of Title 49 of the Code of Federal Regulations and are entirely consistent with the requirements of the Administrative Procedures Act, 5 USC 557. The Plaintiffs are correct that the circumstances in this case, i.e. the referral from the District Court, are unique

within the Federal Highway Administration. Because of this, we are even more constrained to follow the directions of the Court precisely, and to apply the appropriate procedures assiduously.

Plaintiffs do not argue that the Associate Administrator did not apply the Rules of Practice for Motor Carrier Safety Proceedings, but rather seem to argue that it was unnecessary to apply them consistently. Therefore, according to the Plaintiffs, while it was appropriate to appoint a Hearing Officer under the rules, it was inappropriate to modify or set aside the Hearing Officer's decision. The extent of the modification of that decision is also exaggerated by the Plaintiffs. In fact, the first portion of the Final Decision is entirely consistent with the conclusion of the Hearing Officer in the Recommended Decision that Hall's logging and dispatch procedures do not violate Sec. 395.3 of the Federal Motor Carrier Safety Regulations (FMCSR). It was with the more general proscription in Sec. 392.3 that Associate Administrator Casanova felt obliged to disagree with Administrative Law Judge Needleman.*

Plaintiffs contend that Mr. Casanova applied the wrong burden of proof to the issue whether there were, in fact, violations of Sec. 392.3 caused by Hall's logging and dispatch procedures. This issue is discussed thoroughly in the Final Decision, pp. 21-33, and Plaintiffs raise no legal arguments to refute the reasoning developed therein. Similarly, Plaintiffs' contention that the alleged failure of the Final Decision to address "properly" one of the questions posed in the remand order amounts to a procedural error is without legal support. The six "matters" enumerated by the Court on which it sought

* The Director, BMCS, incidentally, differed with Administrative Law Judge Needleman on both points (See Proposed Findings of Fact, Argument and Conclusions of Law), Plaintiffs intimation, therefore that the Final Decision overrules a consistent position of both the Administrative Law Judge and Director is grossly misleading.

"guidance" were thoroughly discussed throughout the Final Decision. A summary of the agency's response in each of these matters was provided, and whether those responses are sufficient to meet the needs of the District Court is better left to Judge Simmons to decide.

Plaintiff's claims of substantive defects in the Final Decision amount to no more than a disagreement with the outcome. They make no new arguments or raise issues that were not already thoroughly developed and exhaustively briefed during the hearing and review process. I am satisfied that my predecessor more than adequately addressed all of these matters in his comprehensive review of the record, and that his Final Decision reflects thoughtful consideration leading to a logical conclusion with which I am in agreement.

WHEREFORE, the Petition for Reconsideration is hereby DISMISSED, and the Final Decision of the Associate Administrator remains the Final Decision of the Agency.

Marshall Jacks, Jr.
Associate Administrator for Safety,
Traffic Engineering and
Motor Carriers

Dated: May 27, 1982

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of May, 1982, copies of the foregoing Decision on Petition for Reconsideration has been sent to the following:

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Dated: May 27, 1982

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